85-456

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner

v.

UNITED STATES POSTAL SERVICE

and

PAUL N. CARLIN, POSTMASTER GENERAL,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Postal Service may constitutionally prohibit Unions representing its employees from engaging in Union-sponsored, nonpartisan voter registration activities in cafeterias and other nonworking, nonpublic areas of those postal facilities during nonworking time, on the ground that the Union's internal publications had urged support for a partisan political candidate and the union was affiliated with the AFL-CIO, which had endorsed a partisan political candidate.

2. Whether the United States Postal Service may constitutionally permit nonpartisan civic leagues or organizations to conduct voter registration drives in public areas of postal facilities but refuse to permit a union representing its employees to conduct nonpartisan voter registration drives in the same areas on the ground that the Union's publications had urged support for a partisan political candidate and the union was affiliated with the AFL-CIO, which had endorsed a partisan political candidate.

TABLE OF CONTENTS

	Page
Questions presented	i
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provision Involved	2
Statement of the Case	2
Proceedings in the District Court	3
Proceedings the Court of Appeals	6
Reasons for Granting the Writ	8
I. The Court of Appeals Application of a "Public Forum" Analysis to Determine the First Amendment Rights of Petitioner Union in Non-public, Nonworking Areas of Postal Facilities, Where it is Already Present to Communicate with its Members Raises Serious and Recurring Questions About the Proper Application of the Public Forum Doctrine	8
II. Exclusion of Petitioner from Voter Registration Activities on the Basis of the Content of Union Publications Raises Fundamental Important Questions About the Permissible Basis for Governmental Selection Between Speakers Seeking Access to Public Property	10
Conclusion	13
Appendix	1a
Decision of U.S. Court of Appeals for the D.C. Circuit	1a
Order of the Court of Appeals Granting Injunction Pending Appeal	14a
Decision of the U.S. District Court for the District of Columbia	18a

TABLE OF CONTENTS—Continued

	Page
Order of the District Court Denying Injunction Pending Appeal	40a
Order of the District Court Granting Summary Judgment	41a
Order of the District Court Denying Plaintiff's Motion for Reconsideration	42a
Order of the District Court Denying Motion for Preliminary Injunction	43a
Order of the District Court Granting Temporary Restraining Order	44a
Memorandum of U.S. District court; filed on April 3, 1985	46a
Plaintiff's Statement of Material Facts Not In Dispute	49a
Plaintiff's Supplemental Statement of Material Facts Not In Dispute	67a
Defendants' Statement of Material Facts	70a
Declaration of Gerald M. Anderson	81a
Declaration of Thomas A. Neill	86a
Declaration of Phillip A. Tabbita	89a

TABLE OF AUTHORITIES

CASES	Page
Allee v. Medrano, 416 U.S. 802 (1974)	10
Connick v. Myers, 461 U.S. 138 (1983)	11
Cornelius v. NAACP Legal Defense and Educatioanl Fund Inc., 53 U.S.L.W. 5116 (84-312, July 2, 1985)	9, 12
First National Bank of Boston v. Bellotti, 435 U.S. 765, *Reh. Denied*, 438 U.S. 907 (1978)	10
Greer v. Spock, 424 U.S. 828	12
Lehman v. City of Shaker Heights, 418 U.S. 304	12
Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983)	9, 11
Pickering v. Board of Education, 391 U.S. 563 (1968)	8, 11
Schneider v. State, 308 U.S. 147 (1939)	9
Tinker v. De Moines Independent Community School District, 393 U.S. 503 (1969)	11
United States v. C.I.O., 335 U.S. 106 (1948)	10
United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973)	8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner American Postal Workers Union, AFL-CIO, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 24, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 764 F.2d 858 and it is reproduced at pp. 1a-to-13a, *infra*. The Opinion of the District Court is reported at 595 F.Supp. 1352 and it is reproduced at pp. 18a to 39a, *infra*.

JURISDICTION

The Court of Appeals' opinion was rendered on June 14, 1985. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment of the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The American Postal Workers Union, AFL-CIO (APWU) is the nationwide collective bargaining representative of more than 300,000 employees of the United States Postal Service. On December 1, 1983, the Postal Service issued a set of "guidelines" under which APWU was prohibited from engaging in further voter registration activities on postal premises, and which prohibited individual postal employees from engaging in any voter registration activities anywhere on postal premises regardless of the identity of the sponsoring organization.[1] The guidelines provide in pertinent part as follows: (App. 37a)

> A. Voter Registration. A postmaster may approve voter registration requests provided all the following conditions are met.

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[1] The guidelines, which specify eight conditions limiting postmaster approval of voter registration requests, were published in Postal Bulletin 21434, December 1, 1983, at 9. The guidelines are reproduced as an appendix to the opinion of the District Court in this case, 595 F. Supp. at 1363 (App. 37a).

> (1) The registration must be conducted by government agencies or non-profit civic leagues or organizations that operate for the promotion of social welfare, but do not participate or intervene in any political campaign on behalf of any candidate for any public office.
>
> * * *
>
> (3) Postal employees must not participate in any voter registration activity conducted on postal premises.

Applying its guideline A(1), the Postal Service prohibited APWU and its affiliated local unions from engaging in voter registration activities anywhere on postal premises on the ground that the Postal Service believed the Union had "participated or intervened" in the 1984 Presidential Campaign on behalf of Walter Mondale (App. 3a).[2] The Postal Service also prohibited all individual employees from participating in any voter registration activities on postal premises, even those conducted by non-partisan organizations under Section A(1) of the guidelines (App. 5a)

PROCEEDINGS IN THE DISTRICT COURT

APWU filed suit in the Federal District Court for the District of Columbia contending, among other things, that the restrictions on voter registration activity imposed by Sections A(1) and A(3) of the Postal Service guidelines violated the constitutional rights of APWU and its members to engage in free speech and to participate in non-partisan political activity.

In support of these contentions, the Union filed sworn declarations of its officers and a Statement of Material Facts Not in Dispute (Statement) asserting that APWU

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[2] There is no evidence or claim by the Postal Service that any postal worker or union officer or agent has ever attempted to influence the choice of party affiliation of prospective registrants in connection with APWU voter registration activities.

has conducted active voter registration drives on postal premises at least since 1973 (Statement ¶ 3, App. 49a-50a); that union officers and stewards have ready access to postal facilities to conduct union business, including, in the past, voter registration (Statement, ¶ 3; Supplemental Statement, ¶¶ 46, 48; App. 67a-68a); that union stewards and local union officers generally work in the same facility where they represent employees; that the nonpublic, nonwork areas of postal facilities often include a union bulletin board or rack with APWU literature; that employees in those areas are free to pass out literature to circulate petitions, debate, discuss politics, or sports, or anything else they desire (Statement, ¶ 23, App. 55a; ¶ 44 [sic], App. 61a).

In response, the Postal Service stated that it disputes APWU's Statements of Fact concerning access of union officers to postal facilities and freedom of postal workers to engage in activities of their choice in nonwork areas during nonwork times, "to the extent inconsistent with Article 23 of the Collective Bargaining Agreement . . . and Section 661.52 of the Employee and Labor Relations Manual (ELRM)" (Defendants Response to Plaintiffs Statement of Mat. Facts, ¶¶ 3, 23, 44 [sic]).[3]

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[3] Article 23 of the parties' Collective Bargaining Agreement provides:

> Upon reasonable notice to the Employer, duly authorized representatives of the Union shall be permitted to enter postal installations for the purpose of performing and engaging in official union duties and business related to the Collective Bargaining Agreement. There shall be no interruption of the work of employees due to such visits and representatives shall adhere to established security regulations.

Section 661.52 of the Employee Labor Relations Manual provides:

> .52 Unofficial Use of Government Property or Services. No employee will use directly or indirectly, or allow the use of Postal Service or government property or services including property leased to the Postal Service of government agency, for other than officially approved activities. Employees have a positive duty to protect and conserve postal service property, including

In response to motions by APWU, the District Court first denied and then reconsidered and granted APWU's motion for a temporary restraining order prohibiting the Postal Service from enforcing Section A(1) of its guidelines to the extent that it would prohibit APWU or its members "from participating or engaging in voter registration activity conducted in a strictly non-partisan fashion consistent with the Hatch Act. . ." and enjoined the Postal Service from enforcing A(3) in its entirety (*Id.*)[4] Subsequently, the District Court denied APWU's motion for preliminary injunctive relief. The Court then entered its memorandum opinion and order granting Summary Judgment in favor of the Postal Service and dismissing the Complaint (App. 18a-39a).

Having concluded that postal premises remained a private forum, the court further concluded that the Postal Service's exclusion of APWU from voter registration activities on postal premises must be sustained "as long as the regulation on speech is reasonable and not an

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equipment, supplies, and other property entrusted or issued to them.

Article 31 of the parties' Collective Bargaining Agreement provides in part:

> Section 1. Membership Solicitation. The Unions may through employees employed by the Employer solicit employees for membership in the unions and receive union dues from employees in non-work areas of the Employer's premises, provided such activity is carried out in a manner which does not interfere with the orderly conduct of the employer's operation.

[4] Also at issue was (B)(8) of the guidelines which prohibited the display of political bumper stickers, pictures, logos, or insignia on personal vehicles of employees. The temporary restraining order likewise enjoined enforcement of that provision as it applied to vehicles of employees not used for business while parked in employee parking lots (*Id.*). The parties resolved their dispute concerning guideline (B)(8) prior to the Summary Judgment Decision of the District Court in this case.

effort to suppress expression merely because public officials oppose the speaker's view" (App. 21a). The Court then sustained Section A(1) on the basis of the Postal Service's proffered justification that voter registration activities by APWU on postal premises "could lead to the perception or appearance that the Postal Service is involved in the political process or is biased in the performance of its mission."

The District Court also upheld the Section A(3) prohibition of postal employee participation in any voter registration conducted on postal premises. In upholding Section A(3), the District Court expressed doubt that First Amendment rights are implicated in voter registration activities, expressed the view that the A(3) restriction is "in fact a very limited one in the context of the first amendment," and sustained the restriction on the basis of the justifications proffered by the Postal Service: that such a restriction is necessary to avoid the appearance of partisanship and to avoid the possibility of coercion of fellow postal workers by employees engaging in voter registration activity (App. 31a).

PROCEEDINGS IN THE COURT OF APPEALS

In response to the APWU's motion, the Court of Appeals granted an injunction pending appeal enjoining the Postal Service from enforcing Section A(1) or Section A(3) of its guidelines.[5] On the merits of the appeal, the Court of Appeals observed that voter registration drives conducted by APWU locals prior to 1984 "took place both in public areas such as post office lobbies and

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[5] The Order expired, by its own terms, when the applicable voter registration deadlines had passed (*id.*). Judge Wilkey filed an opinion dissenting from the court's order granting the temporary injunction.

in nonpublic, nonwork areas such as 'swingrooms,' cafeterias and break areas" (App. 2a). Without distinguishing between public and nonpublic areas, the Court sustained the conclusions of the District Court that "APWU's right of access to postal premises for voter registration purposes was controlled by the standards applicable to a 'nonpublic forum' " (App. 5a); and, likewise, sustained the Section A(1) exclusion of APWU on the ground that "the Postal Service's interest in avoiding an appearance of involvement in the political process is reasonably promoted by restricting on-premises registration to clearly nonpartisan organizations, and that the provision was properly applied to the APWU" (App. 5a).

The Court then addressed the question of the validity, under the Hatch Act and its regulations, of the Section A(3) ban on individual employee participation in on-premises voter registration. The Court concluded that "there is a serious question whether, in view of the Hatch Act regulations, the Postal Service may restrict the right of individual employees to participate in nonpartisan voter registration drives, particularly where such drives are conducted by civic organizations and similar groups which have been granted access to postal facilities for that purpose" (App. 6a). The Court therefore held that the District Court had erred in reaching the question of the constitutionality of Section A(3) of the guidelines without first resolving the question of that provision's validity under the Hatch Act.

Accordingly, the Court of Appeals affirmed the judgment of the District Court insofar as it held Section A(1) lawful, vacated the District Court's judgment with respect to the validity of Section A(3) under the constitution, and remanded the case to the District Court for a determination whether the Section A(3) restriction is valid under the Hatch Act (App. 13a).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS APPLICATION OF A "PUBLIC FORUM" ANALYSIS TO DETERMINE THE FIRST AMENDMENT RIGHTS OF PETITIONER UNION IN NONPUBLIC, NONWORKING AREAS OF POSTAL FACILITIES, WHERE IT IS ALREADY PRESENT TO COMMUNICATE WITH ITS MEMBERS, RAISES SERIOUS AND RECURRING QUESTIONS ABOUT THE PROPER APPLICATION OF THE PUBLIC FORUM DOCTRINE.

This Court has repeatedly stressed that the government's interests in regulating the political conduct of its employees must be balanced against the employees' First Amendment rights. *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 568 (1973); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). The extent to which the government can restrict what their employees say to each other or regulate how they interact with each other and their union representatives in nonworking areas during nonworking time presents profound questions under the Constitution. The courts below answered these questions in a way plainly incompatible with the propositions that government employees do not forfeit their constitutional rights by becoming government employees, and that to override those rights the government must demonstrate a compelling need to do so. (*Id.*)

By ignoring the distinction between lobbies and other public areas of postal facilities and the nonpublic nonworking areas of postal facilities, the Court of Appeals has missed a central point in this analysis: that Petitioner Union is not seeking access to postal facilities; it is already present in those facilities and is seeking to exercise its constitutionally protected right to expression consistent with the needs of the Postal Service. There is no evidence, and the Postal Service does not contend, that union voter registration activities conducted in break

areas and cafeterias among employees on nonworking time would interfere with normal Postal Service operations. The uncontradicted evidence is, to the contrary, that APWU sponsored such voter registration activities for at least 11 years prior to the issuance of the restrictive guidelines at issue in this case.

Voter registration activities were, as the undisputed evidence submitted in support of the parties' cross motions for summary judgment shows, but one of a number of union-sponsored activities which occurred in cafeterias and break rooms at postal facilities. For employees properly present in postal service cafeterias during the lunch hour, it would be much more natural to conclude that such cafeterias are the "quintessential public forums" which by long tradition have been devoted to assembly and debate. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983). As the evidence in this case shows, such nonworking areas are "natural and proper places for dissemination" of information. *Schneider v. State*, 308 U.S. 147, 163 (1939).

As a purported justification for prohibiting nonpublic voter registration efforts by the Union, Respondents' contention that their "interest in avoiding an appearance of involvement in the political process" fails to meet even a rational basis standard of review. As Mr. Justice Stevens observed in *Cornelius v. NAACP Legal Defense and Educational Fund Inc.*, 53 U.S.L.W. 5116 (84-312, July 3, 1985), "the arguments advanced in support of the exclusion are so plainly without merit that they actually lend support to an inference of bias" (*id.* at 5129, footnote omitted.) There can be no serious contention that postal workers will be confused about the distinction between the American Postal Workers Union and the United States Postal Service; and the public, as the undisputed evidence shows, is typically excluded from the cafeterias and break areas.

Certainly Petitioner does not contend that Postal Service cafeterias and break rooms are public forums, or even limited public forums in the usual analysis. They are, however, places where the Union is present through its officers and stewards, as well as its members, and where it engages in constitutionally protected speech. By erroneously applying a public forum analysis to this setting, the Court below was led to a conclusion wholly incompatible with any appropriate balance between the constitutional rights of Petitioner and the minimal countervailing interests of the Respondents in this case.

II. EXCLUSION OF PETITIONER FROM VOTER REGISTRATION ACTIVITIES ON THE BASIS OF THE CONTENT OF UNION PUBLICATIONS RAISES FUNDAMENTALLY IMPORTANT QUESTIONS ABOUT THE PERMISSABLE BASIS FOR GOVERNMENTAL SELECTION BETWEEN SPEAKERS SEEKING ACCESS TO PUBLIC PROPERTY.

The distinction made by the Postal Service, and sustained by the Courts below, between Petitioner and other organizations which might seek to register postal workers on postal premises, was based squarely on the content of internal union magazine and newsletter articles supporting presidential candidate Walter Mondale and opposing the reelection of President Ronald Reagan. This Court has consistently recognized that the Union, as an institution, has First Amendment rights. *See, Allee v. Medrano*, 416 U.S. 802 at 819 n.13 (1974) ("[P]rotected first amendment rights flow to unions as well as their members and organizers"); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777, Reh. Denied, 438 U.S. 907 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

In *United States v. C.I.O.*, 335 U.S. 106 (1948), the government sought to prosecute a labor organization for

publishing an article in an internal publication urging members to vote for a political candidate. A court avoided a constitutional ruling by determining that no statutory violation had occurred. Its analysis, however, the court emphasized the protected nature of a union's publication of its views to its members:

> If [the statute] were construed to prohibit publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interest from the adoption of measures, and the election to office of men espousing such measures the gravest doubt would arise in our minds as to its constitutionality. *Id.*

The decisions of this court have clearly established that where, as here, the government seeks to punish its employees for engaging in speech, it must produce evidence that the speech at issue caused actual harm to governmental interests. *See Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563, at 572-3 (1968); *cf.*, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969).

Manifestly, although a speaker may be excluded from a private forum on the basis of distinctions which are "reasonable" and not "intended to discourage one view point and advance another," *Perry Education Association v. Perry Local Educaters' Association*, 460 U.S. 37, at 46 (1983), distinctions which are merely reasonable cannot justify exclusion of speakers on the basis of the content of their constitutionally protected communications. Accordingly, the Court below did not apply the proper standard for determining whether the distinctions made by the Postal Service guideline are constitutionally permissible.

Both Courts below concluded, erroneously, that a separate and sufficient reason for denying Petitioner the

right to engage in voter registration activities on postal premises is that Petitioner "was not an entity of similar character and that its right of access thus was not governed by the standards applicable to limited public forums. 595 F. Supp. at 1357 (citing *Perry*, 460 U.S. at 48)" 764 F.2d 858, at 861 n.6. In *Perry*, the Court made a meaningful distinction between the incumbent collective bargaining representative of the Teachers and the outside union which sought to have equal access to school mailboxes. It was reasonable for the school district to provide access to the mailboxes for the incumbent union, while excluding a non-incumbent union. Use of the mailboxes was reasonably related to the responsibilities of the incumbent union as a collective bargaining representative.

Likewise in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc. supra*, the Court sustained as reasonable a distinction between advocacy groups and nonadvocacy groups seeking access to the Combined Federal Campaign program. As the Court observed (53 U.S. L.W. at 521):

> The President determined that agencies seeking to affect the outcome of elections or the determination of public policy should be denied access to the CFC in order to avoid the reality and the appearance of government favoritism or entanglement with particular view points.

In sustaining the distinction the court held (*id.*): Here the President could reasonably conclude that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in an aid to the needy. Moreover, avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum. *See Greer v. Spock*, 424 U.S., at 839; *Lehman v. City of Shaker Heights*, 418 at 304."

Thus, inclusion of advocacy groups in the CFC would change the nature of the program, because the function of such groups in the program would be to encourage and obtain contributions to support their efforts to affect the outcome of elections or the determination of public policy. In contrast, APWU's voter registration activities on postal premises result in precisely the same result as voter registration activities of a similar magnitude by other organizations. Because there is no relevant programmatic distinction between the performance of APWU and other organizations seeking to register voters on postal premises, the restrictive Postal Service guideline is stripped of its justification. Accordingly, by erroneously concluding that Petitioner is not "an entity of similar character" the Court was led to apply the wrong standard in determining whether the exclusion of Petitioner from voter registration activities be sustained.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5669

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Appellant

v.

UNITED STATES POSTAL SERVICE, *et al.*

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 84-00270)

Argued May 9, 1985

Decided June 14, 1985

Anton Hajjar, with whom *Darryl J. Anderson* was on the brief, for appellant.

Mitchell R. Berger, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, *Royce C. Lamberth* and *R. Craig Lawrence*, Assistant United States Attorneys were on the brief, for appellees.

John Vanderstar was on the brief for American Civil Liberties Union, et al., *amici curiae*, urging reversal.

Before EDWARDS, BORK and STARR, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: This case involves a challenge by the American Postal Workers Union ("APWU" or

"Union") to the legality of United States Postal Service ("USPS") guidelines that restrict the use of postal premises for voter registration. The challenged guidelines provide, first, that registration on postal property may be conducted only by organizations that do not "participate or intervene" in political campaigns, and, second, that postal employees may not participate in any registration on postal premises. The District Court held both restrictions valid under the First Amendment.[1] The Union appeals.

We agree with the District Court that the Postal Service lawfully may restrict on-premises voter registration to nonpartisan organizations, and we therefore affirm this portion of the District Court's judgment. We find it unnecessary, however, to rule on the constitutionality of the USPS ban on employee participation in such registration. The Union argued in the District Court that this restriction violated not only the First Amendment but also the right of employees under the Hatch Act and its regulations to engage in nonpartisan activities. We hold that the District Court erred in ruling on the constitutionality of the restriction without first deciding whether the case could be decided on nonconstitutional grounds. Therefore, we vacate this portion of the trial court's judgment and remand for further proceedings to determine the legality of the blanket prohibition against employee participation in voter registration on postal premises.

I. Background

Prior to the 1984 election year, a number of APWU locals were permitted to conduct voter registration drives among postal workers and the general public on postal premises. Such drives took place both in public areas such as post office lobbies and in nonpublic, nonwork areas such as "swing rooms," cafeterias and break areas. The

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[1] *American Postal Workers Union v. United States Postal Serv.*, 595 F. Supp. 1352 (D.D.C. 1984).

APWU and its locals planned to register voters once again during 1984.

On December 1, 1983, however, the Postal Service issued a set of "guidelines" restricting the use of postal premises for registration and polling purposes.[2] The guidelines specify eight conditions limiting postmaster approval of voter registration requests. Two are at issue here. Section A(1) of the guidelines provides:

> The registration must be conducted by government agencies or nonprofit civic leagues or organizations that operate for the promotion of social welfare but do not participate or intervene in any political campaign on behalf of any candidate for any public office.

Section A(3) states:

> Postal employees must not participate in any voter registration activity conducted on Postal Service premises.

After these guidelines were issued, postal officials prohibited the APWU and its locals from conducting on-premises registration on the ground that the Union "participate[d] or intervene[d]" in the 1984 presidential campaign on behalf of Walter Mondale. The Postal Service also prohibited *all* individual employees from participating in *any* voter registration activities on postal premises, even those conducted by nonpartisan organizations under section A(1) of the guidelines. The A(3) ban thus extends to individual employees without regard to their union affiliation and without distinction between partisan and nonpartisan activity.

On January 24, 1984, the APWU filed this action on behalf of itself, its members, and postal employees repre-

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[2] POSTAL BULLETIN 21434, Dec. 1, 1983, at 9. The guidelines are reproduced as an appendix to the opinion of the District Court, 595 F. Supp. at 1363.

sented by it. The Union sought a declaration that sections A(1) and A(3) were contrary to applicable civil service laws and violated the constitutional rights of the Union, its members, and other employees, and requested an injunction against their enforcement. On cross-motions for summary judgment, the District Court upheld the constitutionality of both restrictions, and this appeal followed.[3]

II. Discussion

A. *The A(1) Restriction of Registration to Nonpartisan Organizations*

As the Supreme Court recently indicated in *Perry Education Assn. v. Perry Local Educators' Assn.*,[4] the constitutionality of restrictions on the use of government property for expressive purposes is governed by differing standards depending on the character of the property at issue.[5] Applying the analysis outlined in *Perry*, the District Court ruled that the APWU's right of access to postal premises for voter registration purposes was controlled by the standards applicable to a "nonpublic forum."[6] Finding the restriction to be viewpoint neutral

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[3] The Union's interlocutory appeal from the denial of its motion for a preliminary injunction was rendered moot by the issuance of the District Court's decision on the merits on September 25, 1984. *See American Postal Workers Union v. United States Postal Serv.*, No. 84-5290 (D.C. Cir. Oct. 15, 1984) (dismissing appeal as moot). On October 1, 1984, a panel of this court granted the Union's motion for an injunction pending appeal. *American Postal Workers Union v. United States Postal Serv.*, No. 84-5669 (D.C. Cir. Oct. 1, 1984). That injunction fully expired after voter registration deadlines had passed in all states.

[4] 460 U.S. 37 (1983).

[5] *Id.* at 44.

[6] The trial court expressed the view that the Postal Service's grant of access to nonpartisan organizations did not transform postal premises into "limited public forums," but reasoned that, even if it did, the right of access extended only to other entities

and "reasonable in light of the purpose which the forum at issue serves," the trial court held A(1) valid under the First Amendment, and further held that the restriction was properly applied to the APWU.[7]

We agree with the District Court that the nonpublic forum standard is applicable to the APWU's access claim, that the Postal Service's interest in avoiding an appearance of involvement in the political process is reasonably promoted by restricting on-premises registration to clearly nonpartisan organizations, and that the provision was properly applied to the APWU. Accordingly, we affirm the judgment of the District Court on this issue for substantially the reasons stated in its opinion.

B. *The A(3) Ban on Employee Participation in On-Premises Registration*

Section A(3) prohibits postal employees, whether on- or off-duty, from participating in any voter registration activity conducted on postal premises. As a consequence, the restriction covers all employees without regard to their union membership and without distinction between partisan and nonpartisan activity. According to the USPS, the purposes of this restriction are (1) "to avoid any possible appearance that the Postal Service is involved, through its employees, in the political process," and (2) "to prevent coercion or the appearance of coercion of other postal employees who otherwise might feel pres-

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of similar character. Because it found that the APWU participated in a political campaign within the meaning of section A(1), the court ruled that the APWU was not an entity of similar character and that its right of access thus was not governed by the standards applicable to limited public forums. 595 F. Supp. at 1357 (citing *Perry*, 460 U.S. at 48). We agree with this reasoning, and therefore we do not find it necessary to determine whether the grant of access in this case was sufficient to create a limited public forum.

[7] 595 F. Supp. at 1357-60 (quoting *Perry*, 460 U.S. at 49).

sured either to register to vote or to register a certain way if approached on postal premises by their coworkers."[8] The District Court, applying the balancing test of *Pickering v. Board of Education*,[9] held that these governmental interests outweighed the First Amendment interests of postal employees, and therefore upheld the constitutionality of section A(3).[10]

We find it unnecessary to reach the question of the constitutionality of section A(3). It is the settled practice of the federal courts not to decide constitutional questions where a case may be decided on other grounds.[11] Throughout these proceedings, the Union has argued that section A(3) violates not only the First Amendment, but also the rights of employees under the Hatch Act and its regulations to engage in nonpartisan activities.[12] We think that there is a serious question whether, in view of the Hatch Act regulations, the Postal Service may restrict the right of individual employees to participate in nonpartisan voter registration drives, particularly where such drives are conducted by civic organizations and similar groups which have been granted access to postal facilities for that purpose. Because the District Court failed to consider this question before reaching the constitutional issue, we vacate its judgment with regard to section A(3) and remand for an initial determination on the nonconstitutional question.

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[8] Affidavit of William B. Thomas ¶¶ 15, 16 ("Thomas Affidavit"), Joint Appendix ("J.A.") 219-20.

[9] 391 U.S. 563, 568 (1968).

[10] 595 F. Supp. at 1361-62.

[11] *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[12] *See, e.g.*, Brief of Appellant at 27-32; Memorandum of Points and Authorities in Support of Plaintiff's Motion for a Preliminary Injunction, Record Document No. ("R.") 9, at 14-18; Memorandum of Points and Authorities in Support of Motion for Summary Judgment, R. 30, at 12-16.

The Hatch Act bars federal employees from taking "an active part in political management or in political campaigns." [13] In *United Public Workers v. Mitchell*,[14] the Supreme Court made clear that this prohibition "forbids only the *partisan* activity of federal personnel deemed offensive to efficiency":

> It is only *partisan* political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activity toward party success.[15]

The Postal Service appears to acknowledge that section A(3) prohibits USPS employees from engaging in *nonpartisan* as well as partisan voter registration.[16] It is difficult on the record before us to see how such a restriction can be justified under the Hatch Act, at least as applied to registration in public areas of the post office in which the Postal Service allows nonpartisan groups to conduct registration.

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[13] 5 U.S.C. § 7324(a)(2) (1982). The Hatch Act and its regulations are made applicable to the Postal Service by 39 U.S.C. § 410(b)(1) (1982) and 5 C.F.R. § 733.301 (1983).

[14] 330 U.S. 75 (1947).

[15] *Id.* at 99, 100 (emphasis added). In *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the Court "unhesitatingly reaffirm[ed]" its holding in *Mitchell*, including the view that the Hatch Act's prohibitions apply only to partisan activities. *Id.* at 556, 564.

[16] *See* Brief for Appellees at 44-47. Similarly, the District Court recognized that the A(3) ban applies *"regardless of whether the activity is partisan or nonpartisan."* 595 F. Supp. at 1360 (emphasis in original).

The Hatch Act defines the phrase "an active part in political management or in political campaigns" to mean those acts that were prohibited by determinations of the Civil Service Commission ("CSC" or "Commission") before July 19, 1940.[17] In *United States Civil Service Commission v. National Association of Letter Carriers*,[18] the Supreme Court stated that this provision was intended to deprive the Commission of authority to "fashion[] a more expansive definition of the kind of conduct that would violate the prohibition against taking an active part in political management or political campaigns." [19] Instead, the Court found, Congress intended to adopt the Commission's 1940 restatement of the law of forbidden political activity, as developed and refined in subsequent restatements and regulations issued by the Commission.[20]

Those regulations, which currently appear at 5 C.F.R. § 733, clearly recognize a right of federal employees to take part in the sort of registration drives permitted under section A(1). Consistent with the Supreme Court's interpretation of the Hatch Act in *Mitchell* and *Letter Carriers*, the Hatch Act regulations distinguish between partisan and nonpartisan activities, and prohibit only enumerated sorts of partisan conduct.[21] Although voter registration is not included on the list of prohibited activities, some Commission decisions have held that employees may not take part in *partisan* voter registration efforts; the Commission has never held, however, that participation in *nonpartisan* registration drives violates the Hatch Act.[22] Indeed, part 733.111(a)(4) of the reg-

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[17] 5 U.S.C. § 7324(a).

[18] 413 U.S. 548 (1973).

[19] *Id.* at 571-72.

[20] *Id.* at 572-75.

[21] 5 C.F.R. § 733.111, 122 (1983).

[22] *See, e.g., Clarence M. Fitzwilliam*, 1 P.A.R. 77, 80 (1945) (indicating that a voter registration drive under certain circum-

ulations expressly allows employees to "[p]articipate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization." The regulations further provide that "[a]ll employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart." [23]

Thus, the Hatch Act regulations clearly recognize the right of employees to participate in nonpartisan voter registration activities. By prohibiting all postal employees from taking part in any voter registration on postal premises, regardless of its partisan or nonpartisan character, section A(3) seems to interfere with this right. For these reasons, we believe that the appellant has raised a serious issue concerning the validity of section A(3).

On remand, the District Court should determine whether there is any legal basis for the A(3) restriction. In particular, the trial court should consider whether, as the appellees contend, section A(3) can be justified as an exercise of the authority to impose additional re-

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stances could constitute partisan activity). The Commission's 1940 rules state that federal employees must refrain, *inter alia*, from "helping to get out the voters on registration and election days." CSC Form 1236, Political Activity and Assessments, September 1939 ¶ 20, *reprinted in Letter Carriers*, 413 U.S. at 586 app. In context, this prohibition refers to partisan efforts to get out the vote, and the Commission has never interpreted the ban to apply to nonpartisan registration activities. For example, a recent summary of Hatch Act restrictions prepared by the Office of Special Counsel of the Merit Systems Protection Board, which has succeeded to the prosecutorial function of the Commission, states that employees are free "to actively assist in voter registration drives" so long as they do "not attempt to influence voters to register for a particular party." OFFICE OF SPECIAL COUNSEL, U.S. MERIT SYS. PROTECTION BD., POLITICAL ACTIVITY AND THE FEDERAL EMPLOYEE 7, *reprinted in* J.A. 136.

[23] 5 C.F.R. § 733.111(a) (1983).

strictions delegated to the heads of agencies by 5 C.F.R. § 733.111(b).[24] That provision states in relevant part:

> The head of an agency may prohibit or limit the participation of an employee or class of employees of his agency in an activity permitted by paragraph (a) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests.[25]

For an agency regulation to be valid under 5 C.F.R. § 733.111(b), several requirements must be satisfied. First, the regulation must be issued by "[t]he head of an agency." Second, without deciding the point for this court, we note that Judge Harold H. Greene recently ruled in *American Federation of Government Employees v. Pierce*[26] that

> [u]nder the plain language of [5 C.F.R. § 733.111(b)], the head of an agency may not adopt an across-the-board prohibition with respect to an otherwise authorized activity . . .; any such provision must be limited to "an employee or class of employees."[27]

Third, the restriction must have as its purpose "the efficient performance of public duties" or the avoidance of "a conflict or apparent conflict of interest."[28] Finally, it is clear that regulations issued by the heads of agencies under 5 C.F.R. § 733.111(b), no less than those issued by the Commission and its successor, the Office of Personnel Management ("OPM"), must be limited to par-

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[24] *See* Brief for Appellees at 47 n.16.

[25] 5 C.F.R. § 733.111(b) (1983).

[26] 586 F.Supp. 1559 (D.D.C. 1984).

[27] *Id.* at 1561.

[28] *See id.*

tisan activity of the sort that Congress intended the Hatch Act to restrict.[29]

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[29] We therefore consider untenable the appellees' argument that § 733.111(b) authorizes agency heads to restrict not merely *partisan* conduct but also *nonpartisan* activities without regard to the limits of the regulations under the Hatch Act. As we have observed, the Supreme Court has made clear that the Hatch Act "forbids only the *partisan* activity of federal personnel deemed offensive to efficiency." *United Public Workers v. Mitchell*, 330 U.S. at 99 (emphasis added). In *Letter Carriers*, the Court declared that, in amending the Hatch Act in 1940, "Congress intended to deprive the Civil Service Commission of rulemaking power in the sense of exercising a subordinate legislative role in fashioning a more expansive definition of the kind of conduct that would violate the prohibition against taking an active part in political management or political campaigns." 413 U.S. at 571-72. Since the CSC and the OPM were clearly denied authority to impose restrictions beyond those imposed by the Hatch Act, they obviously lacked power to delegate any such authority under § 733.111(b).

For similar reasons, we find no merit in the appellees' contention that the USPS's general grant of rulemaking authority in 39 U.S.C. § 401(2) (1982) affords the Postal Service authority to restrict nonpartisan activity by off-duty employees in defiance of the bounds of the Hatch Act regulations. In adopting the Hatch Act, Congress struck a balance between government and employee interests with regard to political activity, and determined that only certain partisan conduct should be forbidden. *Letter Carriers*, 413 U.S. at 564. Congress charged the Civil Service Commission with responsibility for enforcement of the Act and carefully circumscribed the Commission's authority to impose restrictions beyond those that Congress intended. *Id.* at 571-72, 575. Congress' efforts to limit the reach of the Hatch Act would be nullified if agencies were generally free to impose greater restrictions on off-duty employee political activity. The appellees have pointed to nothing in the language, legislative history, or purposes of the Postal Reorganization Act to suggest that Congress intended § 402(2) to confer the sweeping authority that the USPS claims. Instead, that Act expressly makes the specific provisions of the Hatch Act applicable to the Postal Service. 39 U.S.C. § 410(b)(1) (1982). We decline to hold that, in granting the Postal Service the general authority to make rules, Congress intended to confer plenary authority to regulate employee political activity and impose restrictions beyond those imposed by the Hatch Act.

There is a question whether the A(3) restriction satisfies these criteria. First, the record indicates that the guidelines were issued by the USPS Delivery Services Department rather than by "[t]he head of [the] agency."[30] Second, in prohibiting *all* postal employees from participating in on-premises registration, section A(3), like the regulation at issue in *AFGE v. Pierce*, does not appear to be limited to "an employee or class of employees."[31]

Finally, on the present record, it does not appear to us that there are any legitimate justifications for the A(3) ban, at least as applied to public areas such as lobbies. As we have noted, the Postal Service attempts to justify the A(3) restriction as necessary (1) to avoid an appearance that the Postal Service was involved, through its employees, in the political process, and (2) to prevent potential "coercion" of employees to register or to register in a certain way. We believe that these justifications are extremely tenuous as applied to registration in public areas. We find it difficult to see how the public could conceivably lose confidence in the political neutrality of the Postal Service if off-duty, out-of-uniform postal employees were permitted to take part in voter registration drives conducted in postal lobbies by nonpartisan organizations under section A(1). Similarly, the likelihood that employees could be "coerced" into registering for a particular party if their coworkers are allowed to take part in such nonpartisan registration appears to us equally remote. In any event, it seems to us better assessed after development of facts bearing on the likelihood of coercion under these circumstances.

Thus, on the record before us, we can find no valid justification for a restriction on the right of employees under the Hatch Act regulations to participate in non-

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[30] *See* 595 F.Supp. at 1363 app.; Thomas Affidavit ¶ 1-4, J.A. 216-17.

[31] *See AFGE v. Pierce*, 586 F.Supp. at 1561.

partisan voter registration conducted by civic and similar organizations in public areas such as postal lobbies.[32] However, because this issue was not considered by the District Court or fully explored at oral argument, we remand the case for an initial determination by the trial court.

III. Conclusion

We affirm the judgment of the District Court insofar as it holds section A(1) lawful. We vacate that court's judgment with respect to the validity of section A(3), and remand the case for a determination whether the restriction is consonant with the Hatch Act and applicable regulations.

So ordered.

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[32] We recognize that somewhat different considerations are presented by the question of the right of employees to engage in nonpartisan registration in nonwork, nonpublic areas of postal facilities. On remand, the District Court should determine whether such registration is prohibited by A(3), or by the operation of A(1), and whether there is any legal basis for prohibiting all registration in non-work, non-public areas under either A(3) or A(1).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

Civil Action 84-0270

No. 84-5669

AMERICAN POSTAL WORKERS UNION, *et al.*,
Appellant

v.

UNITED STATES POSTAL SERVICE, *et al.*

[Filed Oct. 1, 1984]

Before: TAMM, WILKEY and EDWARDS, Circuit Judges

ORDER

Upon consideration of appellant's motion for an injunction pending appeal, and the panel already having under consideration appellant's earlier appeal of the District Court's denial of a preliminary injunction and therefore being familiar with the underlying facts and circumstances of the captioned case, it is

ORDERED, by the Court, that appellant's motion for an injunction pending appeal is hereby granted and, it is

FURTHER ORDERED, by the Court, that appellees United States Postal Service and William F. Bolger, their officers, agents, servants, employees, and attorneys, and those in active participation and concert with them,

are enjoined during the pendency of this appeal from enforcing Postal Bulletin 21434, 12-1-83, p.9 at: para. (A)(1), to the extent that para. (A)(1) prohibits the plaintiff, American Postal Workers Union ("APWU") or its members from participating or engaging in voter registration activity conducted in a strictly non-partisan fashion consistent with the Hatch Act; and para. (A)(3) in its entirety; and, it is

FURTHER ORDERED, by the Court, that the contents of this order be publicized to postal managers and employees; and, it is

FURTHER ORDERED, by the Court, that this order shall expire when the applicable voter registration deadline has passed, or until this Court has decided the instant appeal from the District Court's September 25, 1984, order, whichever is earlier; and, it is

FURTHER ORDERED, by the Court, that this appeal shall be briefed as expeditiously as possible in accordance with a schedule to be issued by the Clerk's Office and shall have oral argument during the first regular sitting period after briefing has been completed.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Dissenting statement of Circuit Judge Wilkey is attached.

Circuit Judge Wilkey, dissenting:

The injunction granted today has the effect of summarily reversing *on the merits* both the responsible administrative agency and the district court,[1] all without benefit of plenary argument or briefing. Because the deadlines for registering voters in the bulk of the most heavily contested states falls between October 6 and October 9,[2]—which prevents us from deciding even the most hastily expedited appeal until after the critical period has passed—the majority's unexplained order is absolutely dispositive of the merits of this case. The majority's decision to grant American Postal Workers Union's (APWU's) injunction is tantamount to saying that the Postal Service was wrong to promulgate and enforce its regulations and that the district court was wrong in upholding them.

Although we have had the benefit of briefing and argument on the issue of the trial court's denial of the *preliminary injunction*, my understanding was that we may summarily reverse agency action—which in this case was upheld by the district court *on the merits*—only if we were sure *beyond doubt* that both the agency and the district judge were mistaken as to the applicable law. As this court has stated on several occasions, "a party moving in an appellate court for a summary reversal—*i.e.*, on motions papers, without [the] usual briefs and full argument—has a 'heavy burden of demonstrating both that his remedy is proper and that the merits of his claim so clearly warrant relief as to justify expeditious action.' "[3]

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[1] *See American Postal Workers Union v. United States Postal Service*, CA 84-270 (D.D.C. 25 Sept. 1984).

[2] *See* Brief of Appellant American Postal Workers Union, AFL-CIO at 20-21, 43, *American Postal Workers Union v. United States Postal Service*, 84-5290 (D.C. Cir. argued 7 Sept. 1984).

[3] *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 832 (D.C. Cir. 1972) (per curiam) (footnote omitted) (quoting

The district court's meticulous and carefully-reasoned opinion [4] demonstrates that this is not the sort of clear-cut case that warrants summary treatment, certainly not summary reversal. This court has on prior occasions refused "summarily to reverse the District Court's decision" when "some of the issues appellant raise[d] on appeal concern . . . legal areas, proper judicial resolution of which will require a more extensive discussion by the parties than has now been possible in this summary procedure." [5] It is not the practice of this court summarily to reverse administrative action, upheld upon careful reflection by a district judge, without the clearest of reasons—reasons which the majority does not and cannot provide.

To grant the injunction pending appeal is to give APWU the relief on the merits the district court has *twice* denied—and we do it without oral argument or briefing after the latest decision and opinion of the district court. From the extraordinary disposition ordered today I most strenuously dissent.

United States v. Allen, 408 F.2d 1287, 1288 (1969) (per curiam)); *accord, Ashe v. Robinson*, 450 F.2d 681, 683 (D.C. Cir. 1971) (per curiam).

[4] *See American Postal Workers Union v. United States Postal Service*, CA 84-270, slip op. at 7-13, 15-17.

[5] *Newell v. Ignatius*, 407 F.2d 715, 717 (D.C. Cir. 1969) (per curiam). The court accordingly withheld decision on these issues and ordered that the case be set for accelerated briefing and hearing, *see id.* at 717, a disposition that, because of time constraints, is unfortunately not available to us in this case.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 84-270

AMERICAN POSTAL WORKERS UNION,
Plaintiff

v.

UNITED STATES POSTAL SERVICE
and WILLIAM F. BOLGER,
Defendant

[Filed Sept. 25, 1984]

MEMORANDUM OPINION

This is an action brought by the American Postal Workers Union, AFL-CIO (APWU),[1] to have declared unconstitutional and to enjoin the enforcement of certain United States Postal Service (USPS) "guidelines" which restrict the use of postal premises for voter registration and polling. APWU brings this action on its own behalf, on behalf of its members, and on behalf of postal employees represented by it. The matter is before the Court on cross-motions for summary judgment.

I

Prior to this election year, locals affiliated with the APWU had, either with the permission or acquiescence of

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[1] Plaintiff APWU is an unincorporated association of postal employees. It is the exclusive collective bargaining representative of over 300,000 postal workers. Complaint at ¶ 5.

local postmasters,[2] registered voters on postal premises.[3] Although by contract and regulation[4] APWU was not granted a right of access to postal premises for this purpose, the fact remains that APWU, through its affiliated locals, had been permitted to register voters on postal premises at certain locations for some time.[5]

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[2] *See, e.g.*, Declaration of Clarence E. Shepherd (Shepherd Decl.) at ¶ 2; Declaration of Roy Braunstein (Braunstein Decl.) at ¶ 3; Declaration of Roland L. Carter (Carter Decl.) at ¶ 4; and Declaration of Eleanor Bailey (Bailey Decl.) at ¶ 2.

[3] The following list, found in Plaintiff's Statement of Material Facts (Plf. Mat. Facts) at ¶ 3, gives examples of the cities, the areas of the post offices, and the duration of prior voter registration drives conducted by APWU locals on postal premises:

Local	Place	Year
Seattle	Swing rooms	1982-1983
Cleveland	Cafeteria	1982
San Francisco	Swing rooms	1980-1982
	Lobby	1980-1982
N.Y. Metro	Lobby	1973-1977
	Swing rooms	1977-1983
Houston	Swing rooms & Cafeteria	1980-1983
San Jose, CA	Swing rooms	1982
Detroit	Swing rooms & Stewards' areas	1982

See also: Carter Decl. at ¶¶ 3-5; Braunstein Decl. at ¶ 3; Bailey Decl. at ¶¶ 2-3; and Shepherd Decl. at ¶¶ 1-2.

[4] *See* Articles 23 and 31 of the contract between the APWU and the USPS, and the Postal Service Employee & Labor Relations Manual § 661.52. These provisions indicate that APWU, as an institution, has been granted access to postal premises only for very limited and circumscribed purposes relating to union business. Voter registration is not such a purpose. For the weight to be given to these provisions *see* the Supreme Court's consideration of similar provisions in *Perry* at 40-41 and nn. 3, 11.

[5] *See supra* note 3.

In this election year APWU once again plann[illegible] to register postal employees and the public on postal premises.[6] However on December 1, 1983,[7] the USPS issued a set of "guidelines" [8] which, *inter alia*, prohibited all postal employees and "any organization which participate[s] or intervene[s] in [a] political campaign on behalf of [a] candidate" from registering voters on postal premises. *See* Postal Bulletin 21434, 12-1-83, at 9.[9] Since the issuance of the guidelines, local postmasters have prohibited APWU from registering voters on postal premises on the ground that the APWU "participate[s] or intervene[s] in [a] political campaign on behalf of [a] candidate" within the meaning of the guidelines.[10]

On January 24, 1984, APWU filed this action challenging Sections (A) (1) and (A) (3) of the guidelines.[11]

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[6] *See, e.g.*, Plf. Mat. Facts at ¶¶ 4, 28, 32, 33; Carter Decl. at ¶¶ 6-7; Braunstein Decl. at ¶ 3; Shepherd Decl. at ¶ 4.

[7] These guidelines were allegedly promulgated in response (and in opposition) to legislative activity in Congress. *See* Defendants' Statement of Material Facts (Defts. Mat. Facts) at ¶¶ 1-2; and Letter from W. Allen Sanders to Chairman Ford, Exhibit 1, Defts. Mat. Facts.

[8] A copy of the guidelines is provided at Appendix A.

[9] Defendants state that the guidelines (or regulations) were promulgated under the general rule-making grant of 39 U.S.C. § 401. *See* Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment (Defts. Mem.) at 20; and Defendants' Memorandum in Opposition to Plaintiff's Cross-Motion for Summary Judgment (Defts. Opp.) at 7. Although the provisions are entitled "guidelines", it is evident from their application and from the government's papers (note description of provisions as "regulations" throughout Defts. Mat. Facts) that these guidelines have the force and effect of USPS regulations. *See also* Defts. Mem. at 9.

[10] *See* Plf. Mat. Facts at ¶¶ 6-8, 11; *see also* Bailey Decl. at ¶ 4; Shepherd Decl. at ¶ 8; Braunstein Decl. at ¶ 3; Declaration of Ronald Miera (Miera Decl.) at 5.

[11] Plaintiff originally challenged the application of Section (B) (8) as well, but the Court has been informed by plaintiff that its dispute with USPS over this provision has been resolved.

Plaintiff seeks a declaratory judgment that the aforementioned provisions violate the First Amendment to the United States Constitution, and seeks an injunction against their implementation and enforcement. The Court will examine each of these provisions in turn.

II

1. *Section (A)(1)*

Section (A)(1) provides that a postmaster may approve voter registration requests only if the registration is

> conducted by government agencies or nonprofit civic leagues or organizations that operate for the promotion of social welfare but do not participate or intervene in any political campaign on behalf of any candidate for any public office.

Postal Bulletin 21434, 12-1-83, at 9. As noted above,[12] USPS, through its local postmasters, has denied APWU and its affiliated locals access to postal premises for the purpose of registering voters, on the grounds that APWU is an organization that "participate[s] or intervene[s] in [a] political campaign on behalf of [a] candidate for [a] public office." [13] APWU challenges this provision both as written and as applied to them.[14, 15]

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[12] *See supra* note 10 and accompanying text.

[13] For the basis of this conclusion, *see infra* p. 12.

[14] While APWU has not phrased its challenge in precisely this way (i.e. "both as written and as applied") this is how its arguments break down.

[15] The government asserts that APWU lacks standing to raise this issue since APWU will not admit that it has endorsed a candidate for president of the United States. Defts. Mem. at 13. The government's argument is that if APWU has not endorsed a candidate for president, it is not subject to the restriction contained in (A)(1); and if it is not subject to (A)(1)'s restriction it has not suffered injury-in-fact sufficient to confer standing. *Id.* The Court

a. *Section (A)(1) as written*

The case which controls the Court's review of Section (A)(1) is *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37 (1983); *see also NAACP* v. *Devine*, 727 F.2d 1247 (D.C. Cir. 1984), and *Ysleta Fed. of Teachers* v. *Ysleta Independent School District*, 720 F.2d 1429 (5th Cir. 1983). Under *Perry*, a court's first task is to determine whether the "property" in question is a "traditional public forum," "limited public forum," or "private forum," [16] for "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry* at 44.

"Traditional public forums" are "places which by long tradition or by government fiat have been devoted to assembly and debate." *Id.* at 45. The most often cited examples are "streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* (citation omitted). No evidence has been submitted which would support a conclusion that post offices are traditional public forums.[17]

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rejects this argument. As noted above, *see supra* note 10 and accompanying text, APWU has been denied permission by USPS officials to register voters on postal premises on the ground that APWU is a prohibited organization under (A)(1). The denial on this basis is sufficient to confer standing.

[16] "Private forums" are also known as "nonpublic forums", *see Perry* at 49, and "public property that is neither a traditional nor a limited public forum", *see NAACP* v. *Devine, supra*, 727 F.2d at 1257.

[17] The fact that the public has continuous access to post offices for postal business does not make the property a public forum. *See, e.g., U.S. Postal Service* v. *Greenburgh Civic Assns.*, 453 U.S. 114 (1981) (mailboxes not public forums).

The second category of public property, "limited public forums," consists of "public property which the State has opened for use by the public as a place for expressive activity." *Id.* This is property which was not initially created or designated as a public forum but which has, in essence been transformed into a public forum because the State has opened it to the public as a place for expressive activity. *Id.* at 45-47. As is discussed more fully below, the State need not open the facility to the public at large or for all expressive activity for the conversion to a limited public forum to occur. Although *Perry* suggests that this is the clearest case of a limited public forum, "selective access," either in terms of the activity permitted, or the groups admitted, may at times suffice.[18] The government need not retain the "open" character of the facility indefinitely just because it has at some time opened it to the public. *Id.* at 46.[19] However, as long as the facility does remain open to the public for expressive activity, the standards applicable to public forums apply. *Id.*[20]

Both the facts and language of *Perry* make it clear that a limited public forum is not easily created. As noted above, there are two principal ways that a limited public forum may result. One way is where there is "indiscriminate use by the general public [for the desired activity]," where "permission [is] granted as a matter of course to all who seek [access for the purpose at issue]." *Id.* at 47. This does not describe the instant case.[21]

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[18] *See infra* p. 6, and *Perry* at n. 7.

[19] As the facts of *Perry* illustrate, the government may even close the facility, with certain bounds, to groups formerly granted access. *See infra* pp. 5-6.

[20] The right of access is slightly different where a limited public forum is created by "selective access" rather than by indiscriminate public access. *See infra* p. 6, and *Perry* at 48.

[21] *See supra* note 4 and accompanying text.

A second way is through "selective access." This is where access to the facility is not granted to the public at large, but to select groups or for select expressive purposes. *See Perry* at 46-48 and n.7. *Perry* indicates, however, that selective access, in and of itself, will not necessarily (and not often) suffice.[22] In *Perry* a union sought access to a school mail system. The Supreme Court held that periodic use of the mail system by private non-school-connected groups was insufficient to create a limited public forum, *id.* at 47; that regular access by other organizations, including another union, would not suffice, *id.*; and that prior access by the plaintiff was not enough. *Id.* at 48. Moreover, even when selective access does create a limited public forum, the constitutional right of access extends only to other entities of similar character. *Id.*

It cannot be gainsaid that USPS permits selective access to its premises for the purpose of registering voters. Access for this purpose is granted to "government agencies or nonprofit civic leagues or organizations that operate for the promotion of social welfare but do not participate or intervene in any political campaign on behalf of any candidate for any public office." Section (A)(1). Yet it is the Court's opinion that "[t]his type of selective access does not transform [the] government property into a public forum" anymore than it did in *Perry*. *Id.* at 47.

More importantly, even if the selective access in this case has converted postal premises into limited public forums, they are limited public forums only for entities similar to those being granted access.[23] APWU is not a "government agenc[y] or nonprofit civil leagu[e] or organizatio[n] that operate[s] for the promotion of social welfare." Section (A)(1). Nor is APWU an organiza-

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[22] *See also Greer* v. *Spock*, 424 U.S. 828 (1976), and *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974).

[23] *See* discussion *supra*.

tion that does "not participate or intervene in any political campaign on behalf of any candidate for any political office." *Id.*[24] Accordingly, APWU's right of access to postal premises, if any, is not governed by the standards applicable to a limited public forum.

What remains is the conclusion that postal premises are, for purposes of First Amendment-access regulation analysis, "nonpublic" or "private" forums. Regulations governing access to this type of forum are scrutinized under different standards than regulations governing access to public forums. In addition to time, place, and manner regulations, the government may reserve the property for its intended purposes, communicative or otherwise, "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46. The government retains

> the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

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[24] For the reasons that APWU has been deemed to "participate or intervene in [a] political campaign on behalf of [a] candidate for . . . public office", *see infra* p. 12. The fact that APWU "participates . . . in a political campaign", is a postal workers' union, and is primarily seeking to register fellow postal employees and union members, significantly distinguishes it from the organizations which are granted access under (A)(1). The risk of coercion is much greater in the case of APWU—a partisan organization with close connections to the primary group it seeks to register—than it is in the case of the other groups which are nonpartisan and not connected to the postal workers. *See* discussion of the potential for coercion *infra* p. 16.

Id. at 49. The crux of the standard is that "[t]he . . . policy need only rationally further a legitimate state purpose." *Id.* at 54. In addition, in determining the reasonableness of this type of regulation, a court may consider whether there are "substantial alternative channels that remain open" for communication. *Id.* at 53. Guided by these standards, the Court will proceed to analyze the validity of Section (A) (1).

USPS justifies its access policy on the following grounds. As a general matter, applicable to all the guidelines, USPS believes that non-postal activity should not be permitted where it could lead to the perception or appearance that the Postal Service is involved in the political process or is biased in the performance of its mission. Affidavit of William B. Thomas (Thomas Aff.) at ¶ 6. It is crucial that the public trust the Postal Service to deliver all communications and to perform other services without bias or favoritism. *Id.* at ¶ 12. The restriction in Section (A) (1) is designed to prevent the appearance or public perception that the Postal Service has endorsed or approved a candidate and is not impartial. *Id.* at ¶ 14.

Avoidance of the appearance that the government is partisan or biased has repeatedly been held by the Supreme Court to be a legitimate and important governmental objective. *See, e.g., U.S.* v. *Grace*, 103 S.Ct. 1702, 1710 (1983) ("we do not discount the importance of this proffered purpose [that it should not appear to the public that the Supreme Court is subject to outside influence]"). In *U.S. Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 565 (1973), the Court held

> it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.

See also Greer v. *Spock*, 424 U.S. 828, 839 (1976) (approving the goal of insulating the military from "both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates").

Not only is the proffered justification a legitimate goal in the abstract, it is legitimate in this case "in light of the purpose which the forum at issue serves". *Perry* at 49. The Postal Service is perhaps the most pervasive of all government agencies. Its independence from the political process and freedom from the appearance of being involved in the political process is critical to its effective operation. *See* Thomas Aff. at ¶¶ 5-13; *see also Letter Carriers, supra*, 413 U.S. at 565 (passages referring to the necessity of preserving "confidence in the system" and "reduc[ing] the hazards to fair and effective government"), *Greer* v. *Spock, supra*, 424 U.S. at 839, and *U.S. Postal Service* v. *Greenburgh Civic Assns.*, 453 U.S. 114, 133 (1981).[25]

One might ask if there is not a less restrictive method of achieving the same goal, e.g., requiring the union to clearly disclaim any connection with or support from the Postal Service, or requiring that the activity be conducted in a strictly nonpartisan manner. Aside from the question of the effectiveness of such alternatives, there are two answers to the question. The first is that, as a nonpublic forum, the government is not required to employ the least restrictive alternative. The opinion in *Perry* was utterly devoid of any such analysis. The second answer is that it is this Court's considered opinion that the United States Postal Service may legitimately restrict access to its premises, for the purpose of registering voters, to *clearly* nonpartisan organizations. USPS need not adopt regulations which would inevitably en-

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[25] Nor has plaintiff presented any evidence that USPS "intended to discourage one viewpoint and advance another." *Perry* at 49. Section (A)(1) is viewpoint neutral.

tail significant hair-splitting, gray areas, and substantial policing; it need not embroil itself in the problems of making sure that an otherwise partisan organization will conduct its voter registration—a recognized tool of partisan campaigns [26]—in a strictly nonpartisan manner.[27]

The Court's conclusion that Section (A) (1) is reasonable is buttressed by the fact that substantial alternative avenues for registering voters remain open to the APWU or any other restricted organization.[28] APWU may enlist the services of a non-restricted organization to register voters on premises; [29] the union may urge its members to register through its publications; [30] and it may register

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[26] It is clear that APWU recognizes the value of voter registration in partisan campaigns: *see* Defendants' Supplemental of Material Facts (Defts. Suppl. Mat. Facts) at ¶¶ 48, 53; and Plaintiff's Reply Memorandum (Plt. Reply) at 8. *See also* lead story in the Sunday, September 16, 1984 *Washington Post* which stated that voter registration "was expected to be the most powerful weapon in the Democratic arsenal" this campaign. *Washington Post*, September 16, 1984, at A1, col. 1.

[27] For an analysis of the question of whether a partisan organization is capable of engaging in political activity in a nonpartisan manner, *see American Federation of Government Employees* v. *O'Connor*, No. 84-972, slip op. at 3 (D. D.C. June 29, 1984).

[28] *See Perry* at 53 for the significance of alternative avenues of communication in First Amendment-access regulation analysis. *See also Greer* v. *Spock*, *supra*, 424 U.S. at 839, and *Pell* v. *Procunier*, 417 U.S. 817, 827-28 (1974).

[29] *See* Defts. Mem. at n. 6.

[30] The effectiveness of the APWU publications as a means of communication is borne out by the fact that the APWU conducted a membership presidential preference poll through the use of a pre-paid returnable postcard enclosed in the September issue of the *American Postal Worker* magazine, which drew enough responses to enable APWU to cast 248,972 votes at the AFL-CIO convention. *See APWU News Service*, Vol. XIII, No. 27, 10-5-83, at 1. APWU is also soliciting political contributions from its membership through its magazine.

employees and the public off postal premises, e.g., at union meeting places, malls,[31] or outside public libraries.[32, 33]

In this case plaintiff is demanding the right to register voters "whenever and however and wherever they please". *Greer* v. *Spock*, *supra*, 424 U.S. at 836, quoting *Adderly* v. *Florida*, 385 U.S. 39, 48 (1966); *U.S. Postal Service* v. *Greenburgh Civic Assns.*, *supra*, 453 U.S. at 133. Plaintiff does not have this right. *Id.* Substantial alternative avenues for registering voters exist and Section (A)(1) is more than rational. Section (A)(1) is constitutional, under the First Amendment, as written.

h. *Section (A)(1) as applied*

Plaintiff also argues that Section (A)(1)'s prohibition is unconstitutional as applied to it. Plaintiff asserts that (a) it does not "participate or intervene in any political campaign on behalf of any candidate for any public office"; (b) even assuming that it has endorsed a candidate

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[31] Indeed, the Cleveland local of the APWU had planned to register voters at malls as well as at postal facilities. *See* Plf. Mat. Facts at ¶ 28.

[32] The fact that these methods may not be as efficient or convenient as the methods desired by plaintiff is not dispositive. The First Amendment does not require that the most efficient avenue of communication be available. *See, e.g., U.S. Postal Service* v. *Greenburgh Civic Assn.*, *supra*, 453 U.S. at 129. Moreover, the Court has trouble with plaintiff's assertion that alternative avenues do not exist when plaintiff's own papers have stated that "attempts to register voters on public property . . . were bound to fail, *and have not even been tried*". Brief in Support of Plaintiff's Motion for Reconsideration of this Court's Denial of the Temporary Restraining Order at 4 (emphasis added).

[33] Plaintiff's suggestion that postal employees are denied the right to be registered is frivolous. Employees may register themselves in the same way any other citizen registers to vote. With respect to this argument, the Supreme Court's statement in *Greer* v. *Spock* is instructive: "members . . . are wholly free as individuals to attend political rallies, out of uniform and off base". 424 U.S. at 839.

or otherwise participated in the campaign, that does not mean that its individual union members identify themselves with the organization's partisan goals; and (c) just because the union may be partisan does not mean that it cannot register voters in a nonpartisan fashion. *See* Plf. Mem. at 13-15.

With regard to the first argument, the government has submitted more than ample evidence to support the conclusion that APWU does "participate" in this election on behalf of the Democratic presidential candiate. *See* Defts. Suppl. Mat. Facts at ¶¶ 47-54 (referring to statements in APWU publication). Statements in the APWU publication, *The American Postal Worker*, indicate that it is a highly politicized organization with the partisan goal of electing a pro-labor Democratic president of the United States. *See id.* The publications demonstrate that voter registration is viewed by APWU as a key method of achieving this goal. *Id.* at ¶¶ 48, 53, and 54.[34] APWU is "affiliated" with the AFL-CIO, which unequivocally endorsed Mr. Mondale as the Democratic nominee, and the APWU participated in the AFL-CIO nominating convention to the extent of casting votes for Messrs. Mondale and Glenn. *See* Plf. Mem. at 2. For APWU to assert that they are not participating in this election on behalf of a candidate is to ignore the plain meaning of the word "participate" and to construe too narrowly the words "on behalf of". APWU has urged its members, through union literature, to undertake activities in support of the labor endorsed Democratic candidate. Defts. Suppl. Mat. Facts at ¶¶ 46-54.

The Court rejects plaintiff's other two arguments as well. As for the second argument, (A)(1) is only addressed to organizations as a whole; as an organization, the evidence supports the conclusion that APWU is participating in this election in a partisan manner. With

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[34] *See also, supra* note 26.

regard to the third argument, again (A)(1) does not focus on the particular activity, but rather on the character of the organization. For the reasons discussed above,[35] the Court finds this method of regulation constitutionally permissible in this case.[36]

The application of Section (A)(1) to prohibit the APWU from registering voters on postal premises is lawful.

2. *Section (A)(3)*

Section (A)(3) provides that

> [p]ostal employees must not participate in any voter registration activity conducted on Postal Service premises.

Postal Buletin 21434, 12-1-83, at 9. The first step in the Court's analysis is to flush out exactly what the regulation does and does not prohibit. Section (A)(3) prohibits *all* Postal employees from conducting any kind of voter registration,[37] *regardless of whether the activity is partisan or nonpartisan,* on postal premises *only.* The regulation does not prevent postal employees from registering voters *off premises,* nor from urging their co-workers to

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[35] *See supra* notes 26-27 and accompanying text.

[36] *Id.* Moreover, the evidence presented on the manner used to register employees in New York suggests that at least in some locations the registration has not been conducted in a completely neutral fashion. In New York, the registration forms used by the APWU included a space for marking party affiliation, and the forms were returnable to the union instead of to a local Board of Election. *See* discussion *infra* p. 16; *see also* Bailey Decl. at ¶¶ 39,41.

[37] The intent of this provision is to prohibit organizations which qualify under (A)(1) from employing the services of USPS employees to register voters on postal premises. Deft. Mem. at 2. Defendants' pleadings indicate, however, that (A)(3) prohibits an employee from registering voters on postal premises even if done on the employee's own initiative. Defts. Mem. at 5.

vote, to register to vote, to vote a certain way, or to register with a particular party, *on postal premises.* Defts. Mem. at 4-5.

Thus, Section (A)(3) does not restrict the *expression* contained in the activity of registering voters on postal premises; it only restricts the activity. Off postal premises, Section (A)(3) restricts neither the activity nor the expression. Properly viewed, the regulation is in fact a very limited one in the context of the First Amendment. Its restrictions on expression, debate, and the interchange of ideas—the core values which the First Amendment seeks to protect[38]—are realistically quite minimal if not nonexistent. Accordingly, at the outset this Court would question whether the First Amendment is even implicated here.

Assuming for the purposes of discussion that the First Amendment is implicated, the next step in the Court's analysis is to determine the appropriate standard of review. Plaintiff argues that the standards enunciated in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) govern. The government disagrees,[39] arguing that *Pickering* dealt with spech-expression only, and therefore must be restricted to cases involving the regulation of speech-expression, as opposed to conduct. While the government is correct that *Pickering* was primarily concerned with a restriction on speech, and that the holding of the case was couched in terms of speech,[40] the Supreme Court appears

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[38] These were also some of the values which the Supreme Court identified and sought to protect in the *Pickering* and *Connick* decisions. *See Pickering* v. *Board of Education*, 391 U.S. 563, 571-73 (1968); *Connick* v. *Myers*, 103 S. Ct. 1684, 1687 (1983).

[39] The government argues that *Letter Carriers, supra*, 413 U.S. 548 (1973) governs review of Section (A)(3), and that the relevant inquiry is whether the regulation furthers legitimate governmental goals. *See* Defts. Opp. at 3-4, and Defts. Mem. at 7.

[40] *See Pickering, supra*, 391 U.S. at 568, 572-74.

to have extended the holding of *Pickering* to cover conduct too. In *Letter Carriers, supra*, 413 U.S. at 564, the Court stated

> [a]s the Court held in *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968), the government has an interest in regulating the *conduct* and the "speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general". (emphasis added).

Although this Court has other reservations about the applicability of *Pickering* to Section (A)(3),[41] the case cannot be distinguished for the reason suggested by the government. iWthout deciding the issue,[42] the Court will apply *Pickering* as plaintiff urges. For even under the

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[41] Simply put, the facts and issues in *Pickering* seem materially different from the facts and issues of this case. In *Pickering* the plaintiff, a school teacher, had been dismissed from his job for publishing a letter in a local newspaper which criticized the manner in which the school board had handled proposals to raise revenue. Thus, the issue was not whether the employer (school board) could *regulate* the employee's speech on school premises, but rather whether the employer could *completely suppress* the teacher's speech, expression, and views. The school board attempted to deny completely the right of the teacher to comment on matters of public interest—a fundamental value which the First Amendment seeks to protect. In this case, postal employees remain free to comment on politics and other matters of public interest, even while at work; they remain free to comment and to register voters off postal premises. Thus the restriction in the case at bar is much more limited than the wholesale ban on critical comment in *Pickering*.

[42] The bottom line is that the facts of this case do not fit neatly within any of the well-recognized First Amendment analyses or categories. In some ways (A)(3) is an "access" regulation, suggesting a *Perry*-type analysis. Even more basically, the regulation could be viewed as a simple content-neutral, time-place-manner restriction. Under either analysis this Court would uphold the constitutionality of (A)(3).

Pickering analysis, the Court finds the regulation to be constitutional.

In *Pickering*, 391 U.S. at 568, the Court held that

> [t]he problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees.

Accord, Letter Carriers, supra,. 413 U.S. at 564. The government has stated that Section (A) (3) was promulgated (1) to avoid any possible appearance that the Postal Service is involved, through its employees, in the political process, Thomas Aff. at ¶¶ 15, 16; and (2) to prevent coercion or the appearance of coercion of other postal employees who might feel pressured either to register against their wishes, or to register a certain way. *Id.* at ¶ 16.

The Supreme Court has held these justifications to be valid in other First Amendment cases. *See, e.g., U.S.* v. *Grace, supra,* 103 S.Ct. at 1710 (avoidance of appearance of partisanship valid justification); *Letter Carriers, supra,* 413 U.S. at 565 (same); and *id.* at 566 (avoidance of coercion valid justification). The potential for coercion of fellow postal workers is especially real in this case.[43] As discussed above, postal employees remain free, *at work,* to express their private, partisan opinions and to urge their co-workers to vote or register in a particular way.[44] If postal employees were also permitted to regis-

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[43] The government need not await and demonstrate an actual incident of coercion as plaintiff contends. If the government can demonstrate that the potential for coercion is real, it may adopt a prophylactic rule. *See Connick* v. *Myers, supra,* 103 S.Ct. at 1692 & n.12; and *Perry* at n. 12.

[44] *See* 5 C.F.R. § 733.111(a)(2); *see also* discussion *supra* at pp. 13-14.

ter their co-workers at work, there would be instantaneous combustion: as a private citizen the employee could urge his co-workers to vote for candidate X, while under (A) (3) he could register the co-workers with candidate X's party. The result would be coercion and partisan registration.

Moreover, there is already some evidence that previous registration drives in certain locales were not conducted in an altogether benign fashion. In the New York Metro area the registration form used by the APWU has a space for marking party affiliation, and the forms are returnable to APWU officials instead of directly to a Board of Election.[45] By this method, APWU could find out what party a worker is affiliated with and, if not "politically correct", exert pressure on the worker to change.

Finally, as the Supreme Court has recognized, coercion may be tacit as well as express and still be real. *See Letter Carriers, supra*, 413 U.S. at 566. The suggestion that postal employees and union members, some of whom might hold relatively high positions in the Postal Service or the union, could register co-workers and fellow union members in a nonpartisan fashion immediately calls to mind the scene, familiar to all former enlisted men, of the army pay line with the paymaster handling out checks, followed by the Red Cross representative collecting donations, followed by the staff sergeant silently watching who gave and who did not. The USPS's concern about coercion at the work place seems entirely reasonable in this case.[46]

Since postal workers remain free to register voters (and to be registered) off postal premises, APWU's desire to

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[45] *See supra* note 36.

[46] The Supreme Court, in *Letter Carriers, supra*, 413 U.S. at 566 also rejected the argument that a prohibition on coercion would be sufficient to prevent the problem.

be able to do this on premises is not sufficient to outweigh the government's interests in this area. Accordingly, the Court finds Section (A) (3) constitutional.

III

For the foregoing reasons defendants' motion for summary judgment is granted, plaintiff's motion for summary judgment is denied, and this case is dismissed.

An appropirate order has been issued.

Date: Sep. 25, 1984

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

APPENDIX A

POSTAL BULLETIN 21434, 12-1-83, Page 9

USE OF POSTAL PREMISES FOR VOTER REGISTRATION AND POLLING

Postmasters approached regarding the use of postal premises for registration and polling purposes should use the following guidelines:

A. Voter Registration. A postmaster may approve voter registration requests provided all the following conditions are met.

(1) The registration must be conducted by government agencies or nonprofit civic leagues or organizations that operate for the promotion of social welfare but do not participate or intervene in any political campaign on behalf of any candidate for any public office.

(2) Absolutely no partisan or political literature will be available, displayed, or handed out. This includes photographs or likenesses and cartoons of elected officials and candidates for public office.

(3) Postal employees must not participate in any voter registration activity conducted on Postal Service premises.

(4) The registration must not interfere with the conduct of usual postal business, postal customers, or postal operations.

(5) The organization will provide and be responsible for any equipment and supplies.

(6) Contributions may not be solicited.

(7) Access to the workroom floor is prohibited.

(8) Voter registration activities will not become permanent, but will be limited to an appropriate period before an election.

B. Polling. Approval to use postal premises as a polling place is given by the Postmaster General or his designee. A request to use a postal facility will be considered only if the facility is the only reasonable available place for voting in the area and the following conditions are met.

(1) The facility must be used as is and must not be materially altered to accommodate machines, voters or workers.

(2) The Postal Service will not provide any assistance in the installation or removal of items needed for voting or in the polling process itself.

(3) Voting must not interfere with normal postal business.

(4) Voter entrances and exits must be arranged to ensure the security of the mails.

(5) Workroom floor space may not be used for voting.

(6) Local law enforcement officials must agree in advance to enforce Postal Service regulations governing conduct on postal premises and all applicable state and local laws during the voting.

(7) The state or local government must agree in advance to reimburse any costs incurred by the Postal Service for additional security, utilities, or building operations necessary to allow the use of the facility for voting.

(8) There must be an absolute prohibition against the display or distribution of any political literature, badges, insignia, or posters on Postal Service premises, including parking areas.

Submit request to Headquarters, Delivery Services Department, Office of Delivery & Retail Operations through the Regional Postmaster General no fewer than 60 days before the election. A request must include complete details addressing each of the above conditions and a statement that there are suitable non-postal facilities available.

These procedures are intended to provide for the use of postal premises where they are truly needed for voting and, at the same time, to ensure that there is no disruption of postal services.—*Delivery Services Dept., 12-1-83.*

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0270

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Plaintiff

v.

UNITED STATES POSTAL SERVICE, *et al.*
Defendants

[Filed Sept. 27, 1984]

ORDER

This case comes back before the Court on the plaintiff's motion for an injunction pending appeal. The defendants have advised the Court's Chambers that they oppose the motion.

After giving consideration to the motion and the record in this case, and the Memorandum Opinion filed in this case on September 25, 1984, the Court concludes that there is little or no likelihood of success of the merits and that therefore, the motion should be denied.

It is hereby

ORDERED that the plaintiff's motion for an injunction pending appeal is denied.

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

Sep. 26, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 84-270

AMERICAN POSTAL WORKERS UNION,
Plaintiff

v.

UNITED STATES POSTAL SERVICE and
WILLIAM F. BOLGER,
Defendant

[Filed Sept. 26, 1984]

ORDER

Upon consideration of Plaintiff's Motion for Summary Judgment, Defendants' Motion for Summary Judgment, the pleadings thereto, and argument of counsel, and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that Plaintiff's motion be and is denied; and it is further

ORDERED that Defendants' motion be and is granted; and it is further

ORDERED that this case be and is dismissed with prejudice.

Date: Sep. 25, 1984

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 84-0270

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Plaintiff

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Defendants

[Filed Apr. 19, 1984]

ORDER

It is hereby

ORDERED that plaintiff's motion for reconsideration is denied.*

Dated: April 18, 1984

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

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* This relates to plaintiff's motion for reconsideration of the order in which this Court denied plaintiff's motion for a preliminary injunction.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0270

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Plaintiff

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Defendants

ORDER

This comes before the Court on the plaintiff's motion for a preliminary injunction. On April 3, 1984, this Court granted plaintiff's request for a temporary restraining order. At that time the Court had only the benefit of the plaintiff's papers. The Court has now had the benefit of a detailed memorandum filed by the government and additional submissions filed by the parties.

After giving careful consideration to the motion, the opposition thereto, and the record in this case, the Court concludes that the plaintiff is not likely to suffer irreparable harm if injunctive relief is denied. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 182 U.S. App. D.C. 220, 559 F. 2d 841 (1977). Upon consideration of the most recent submissions, the Court concludes that (a) plaintiff has alternative avenues of communication and registration available to it and (b) plaintiff has not made a substantial showing that it is likely to succeed on its First Amendment claim.

It view of the above, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction is denied.

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

Apr. 13, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. 84-0270

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Plaintiff,

v.

UNITED STATES POSTAL SERVICE and
WILLIAM F. BOLGER,
Defendants.

[Filed Apr. 13, 1984]

ORDER

For the reasons specified in the Memorandum to be filed, it is hereby

ORDERED that plaintiff's motion for reconsideration is granted; and it is further

ORDERED that the defendants, United States Postal Service and William F. Bolger, their officers, agents, servants, employees, and attorneys, and those in active participatiaon and concert with them, are temporarily restrained pursuant to Fed. R. Civ. P. 65, from enforcing Postal Bulletin 21434, 12-1-83, p.9 at: ¶ (A) (1), to the extent that ¶ (A) (1) prohibits the plaintiff, American Postal Workers Union ("APWU") or its members from participating or engaging in voter registration activity conducted in a strictly non-partisan fashion consistent with the Hatch Act; ¶ (A) (3) in its entirety; and ¶ (B) (8) to the extent that it prohibits the display of political

bumper stickers, pictures, logos, or insignia on personal vehicles of employees which are not used for postal business while parked in employee parking lots; and it is further

ORDERED that the APWU and its members may not conduct or particiapte in any activity in any manner which violates the Hatch Act and the Hatch Act Regulations; and it is further

ORDERED that the contents of this Order be publicized to postal managers and employees; and it is further

ORDERED that plaintiff post security in the amount of $1,000.00 for the payment of such costs and damages as may be incurred or suffered by the defendants if it is found to have been wrongfully enjoined, such bond to be approved by the Court or the Clerk of the Court; and it is further

ORDERED that this Order shall expire at 6:00p.m. on April 13, 1984 unless before such time the Order is extended upon a showing of good cause or consent of the defendants.

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge
For The District Of Columbia

Dated: Apr. 3, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 84-0270

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Plaintiff

v.

UNITED STATES POSTAL SERVICE,
and WILLIAM F. BOLGER,
Defendants

[Filed Apr. 3, 1984]

MEMORANDUM

This matter comes before the Court on plaintiff's motion to reconsider an order, entered the evening of March 30, 1984 by this Court, which denied plaintiff's application for a temporary restraining order ("T.R.O.").

Plaintiff, American Postal Workers Union, AFL-CIO ("APWU"), sought to enjoin the United States Postal Service ("USPS") and William F. Bolger, and their agents, from enforcing certain provisions of the recently promulgated Postal Bulletin 21434 ("the Bulletin"). The Bulletin, issued December 1, 1983, prohibits, *inter alia*, the APWU from engaging in voter registration on Postal Service premises, *absolutely* prohibits *all* postal employees from participating in on-premises voter registration activity, and *absolutely* prohibits (at least facially) the display or distribution of any political literature, badges, insignia, or posters on Postal Service premises, *including*

the parking areas. Plaintiff has challenged these provisions of the Bulletin on the grounds that they unconstitutionally prohibit, in derogation of the First Amendment, the plaintiff and postal worker members from engaging in non-partisan voter registration and other constitutionally protected rights of political expression.

This Court, in denying the motion for a T.R.O. held, among other things, that the Bulletin restricted only on-premises voter registration activities, and that alternative avenues of communication and registration existed off Postal Services premises. This finding was found to negate the requirement of irreparable harm.

In support of its motion for reconsideration, plaintiff has submitted to the Court additional affidavits which set forth in greater detail why alternative avenues of communication and voter registration are not feasible and how irreparable harm will be suffered by the plaintiff and its postal worker members.

Upon reconsideration of plaintiff's motion, plaintiff's additional affidavits, defendants' arguments and affidavit, the relevant statutes, regulations, and case law, the Court concludes that the motion to reconsider should be granted and that a T.R.O. should issue.

In considering an application for a T.R.O. the Court must weigh four factors: (1) the probability of success on the merits; (2) the likelihood of irreparable harm to petitioner absent the relief requested; (3) the likelihood of substantial harm to respondent should the injunction issue; and (4) the public interest. *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

With regard to the likelihood of success on the merits, the Court concludes that, for purposes of a T.R.O., plain-

tiff has carried its burden. The Court observes that First Amendment rights seem to be implicated; that restrictions on First Amendment rights must be narrowly tailored; that the prohibitions in the Bulletin appear to be absolute; that nothing in the Hatch Act, 5 U.S.C. § 7324 in particular, or the Hatch Act Regulations, 5 CFR §§ 733.111(a)(4) and 733.111(b) in particular, seems to prohibit non-partisan voter registration activities or to authorize the absolute prohibitions of the Bulletin; that the activity proscribed by the December Bulletin has historically been permitted (*see* Postal Bulletin 21428) and engaged in; and that the Hatch Act Regulations appear to permit participation in the non-partisan political activities of a labor organization, 5 CFR § 733.111(a)(4).

With regard to the second factor, irreparable harm, plaintiff's supplemental affidavits show that alternate avenues of voter registration off Postal Service premises are not likely to be as effective as on-premises registration because of the locations of the Post Offices, the locations of the entrances and exits, and the schedules of the postal workers. In addition, registration deadlines in Texas and Ohio are imminent (April 5 and April 9 respectively). Most importantly, it is settled law that the loss of First Amendment freedoms, for even minimal periods of time, constitutes irreparable injury. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976); *Deerfield Medical Center* v. *City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981).

The Court perceives little or no harm to the Postal Service as a result of the T.R.O.—certainly no harm of a magnitude sufficient to justify the denial of an injunction. With regard to USPS's argument that on-premises registration might disrupt the efficient flow of business, the Court notes that the Bulletin permits other organizations to conduct on-premises registration (*see* Bulletin

at ¶ (A) (1)). With regard to the argument that such activity by postal workers will create the appearance that the USPS is participating in a partisan manner in the election, the Court observes that the Hatch Act Regulations clearly require that the voter registration by employees be non-partisan and conducted in a non-partisan fashion.

Finally, since fundamental rights seem to be implicated, the public interest would seem to favor their exercise rather than their restriction. *See Deerfield Medical Center, supra,* at 339.

For the foregoing reasons, plaintiff's motion is granted and a T.R.O. is entered restraining defendants from enforcing certain portions of the Bulletin.

An appropriate Order has been entered.

Dated: April 4, 1984

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0270

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Plaintiff,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Defendants.

PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. H.R. 2369, which was opposed by the USPS, was a bill to provide access to "lobby space" to "qualified nonprofit organizations" for, among other purposes, "soliciting voter registration." The bill did not address voter registration by postal workers in nonwork areas and on nonwork time. Def. St. Mat. Facts Exh. 1.

2. The letter dated September 30, 1982, by APWU President Biller, protested information he had received that the USPS intended to bar voter registration altogether from public areas of the post office. Neither this letter nor Assistant Postmaster General Gildea's reply of October 14, 1982, addressed voter registration by postal workers in nonwork areas and on nonwork time. Pl. Mot. for P.I. Exhs. 2 & 3.

3. Locals affiliated with the APWU have historically registered voters in post office lobbies and registered postal workers in nonwork areas, such as swing rooms, break areas and cateferias, on nonwork time, such as meal periods and break time. These activities were undertaken openly, and often with the express approval of

postal management (e.g., Cleveland, Houston and New York City). Examples include the following:

Local	Place	Year
Seattle	Swing rooms	1982-1983
	Lobby (by NALC)	1983
Cleveland	Cafeteria	1982
San Francisco	Swing rooms	1980-1982
	Lobby	1980-1982
N.Y. Metro	Lobby	1973-1977
Houston	Swing rooms & Cafeteria	1980-1983
San Jose, CA	Swing rooms	1982
Detroit	Swing rooms & Stewards' areas	1982

Other locals using swing rooms are: Los Angeles; Portland, OR; and Albuquerque, NM. Other locals using lobbies are: Portland, OR; Omaha, NE, and Beaumont, TX. (Braunstein and Carter first and second Dec's; Bailey, Shepherd, Miera and Reid Dec's.)

4. The APWU and its affiliated locals have had and do have plans to engage in voter registration actively among the general public in public areas such as post office lobbies and among postal workers in nonwork areas and on nonwork time, and intend to do so if unrestricted by the USPS. These include the locals specified in paragraph 3, above, as well as the Hub Area (Lubbock, TX), Buffalo, West Palm Beach, Broward County (FL) Area, New Haven Area, Columbus (OH) Area, Cincinnati, Santa Fe and Great Falls (MT) Locals. (*Id.*; Gonzales Dec.)

5. On December 1, 1983, the USPS issued Postal Bulletin 21434 ("the Guidelines") (Complaint Exh. 1).

6. The Guidelines prohibit voter registration by organizations which participate or intervene in any political campaign on behalf of any candidate for any public of-

fice" (item A(1)). The USPS considers the APWU and its affiliated locals as participating and/or intervening on behalf of political candidates. (Carter first Dec.; Shepherd, Miera & Bailey Dec's.)

7. The USPS applies the prohibiting of item A(1) of the Guidelines to the APWU and its affiliated locals (*Id.*).

8. The USPS prohibits the APWU and its affiliated locals from engaging in voter registration on postal premises, including both lobbies and nonwork areas such as swing rooms, break areas and cafeterias (Id.).

9. Item A(7) of the Guidelines prohibits organizations from access to workroom floors. The USPS has construed this item to include nonwork areas such as swing rooms, rest areas and cafeterias. The USPS thus prohibits the APWU and its affiliated locals from registering voters in nonwork areas (*Id.*).

10. Item A(3) of the Guidelines states: "Postal employees must not participate in any voter registration activity conducted on Postal Service premises." This prohibition prevents voter registration by members of the APWU and its affiliated locals in nonwork areas and on nonwork time (*Id.*).

11. Whenever requested, agents of the USPS have denied permission to the APWU and its affiliated locals to allow voter registration by them and their members both in post office lobbies and in nonwork areas of postal premises on employees' nonwork time (*Id.*). For example: John Gomez, Operations Director of JAF in New York City informed Eleanor Bailey that N.Y. Metro could not register voters in nonwork areas and on nonwork time as in the past. (Bailey Dec.) In March 1984, management in Albuqueque, NM, denied the Local permission to register postal workers in the employee lunch room and the public in the post office lobby. Employee

and Labor Relations Director James Taylor told Local President Ron Miera that he would be fired if he attempted to register voters on postal premises. (Miera Dec.) On March 8, MSC Manager Robert Sprague refused to allow the New Haven Local to have a voter registration table in the post office lobby. (Braunstein 1st Dec.) On March 30, 1984, Postmaster Wallace Kiddo refused to allow the Houston Local to register voters in swing rooms, the cafeteria, and the lobby at the General Post Office. He informed Local President Clarence Shepherd that if anyone attempted to do so, he or she would be forced to leave the building. (Shepherd Dec.) By letter dated March 21, 1984, MSC Manager/Postmaster Jefferson Wilson referring to the Bulletin, denied permission to the San Francisco Local to register voters in the post office lobby and swing rooms. (Pl. Exh. 1(a)-(b), attached.)

12. Voter registration by the APWU and its locals typically is done by volunteer members who are deputized as registrars in states requiring such registration, or else who simply distribute and sometimes collect executed voter registration forms in so-called "postcard registration" states. (Bailey, Shepherd, Miera, and Carter 1st Dec's.)

13. The Guidelines are enforced by the USPS. The USPS will remove from the premises any person who registers voters in violation of the Bulletin. (Def. St. of Mat. Facts Not in Dispute, ¶ 12.)

14. Local union officials believe that postal workers will be disciplined if they disobey directives by USPS supervisors to refrain from or to cease registering voters on postal premises. (Bailey, Shepherd, Miera, Gonzales & Carter 1st Dec.)

15. Prior to the April 6, 1984, affidavit of William J. Downes, Director of the Office of Programs and Policies of the USPS, no supervisor, manager or agent of the USPS has informed the APWU that violation of the

Guidelines would not subject employees to discipline for work rule infractions (*Id.*).

16. The USPS has never stated, and does not now state, that employees who disobey directives to refrain from or cease registering voters in Postal premises, or who refuse orders to leave the premises, will not be disciplined for insubordination or some other alleged infraction. (Def. St. of Mat. Facts Not in Dispute, ¶ 12.)

17. Voter registration activities of the APWU and its affiliated local unions have not been undertaken on behalf of any political party or candidate. There is no evidence in this case or claim by the USPS that any postal workers or union officer or agent has ever attempted to influence the choice of party affiliation of prospective registrants in connection with APWU or local voter registration activities. (Bailey, Carter 1st, Braunstein. 1st, Shepherd, Miera, Gonzales & Erskine Dec's.)

18. The APWU and its affiliated local unions have learned that their ability to achieve their legislative goals to improve the welfare of postal workers, other workers, and all citizens, is enhanced by its ability to demonstrate that a high percentage of its members are voters, regardless of their party membership. The APWU and its affiliated locals also view voter registration as a public service and a civil right of members (*Id*).

19. In early February 1984, USPS managers required postal workers in Des Moines, IA, to remove political bumper stickers from their personal automobiles parked in USPS employee parking lots (Braunstein 1st Dec.).

20. In Omaha, NE, USPS managers told officers of the Omaha Local that vehicles with political bumper stickers had to be removed from employee parking lots (Id.).

21. No rule, regulation or directive of the USPS prohibits postal workers from displaying political bumper stickers and insignia on personal automobiles parked in

USPS employee parking lots so long as they are not being used for official business. (Pl. Mem. in Support of P.I. Mot., Exh's 6-8; 39 C.F.R. § 447.51-52).

22. The APWU has not and does not claim the right to engage in voter registration activities on the workroom floor, i.e., where mail is actually sorted and handled (Pl. Mem. in Support of P.I. Mot. at 2 ¶ B & 22).

23. Union solicitation and distribution of union-sponsored material is permitted on nonwork areas such as swing rooms, employee cafeterias and break areas, and on nonwork time, such as meal and break periods. These are areas set aside by the USPS for employee association, discussion, interchange, and activity away from work areas, so that there is no disruption of mail processing (Anderson Dec.).

24. The APWU has not and does not claim the right to register voters in public areas of the post office, such as lobbies, in circumstances where "nonprofit civic leagues or organizations that operate for the promotion of social welfare but do not participate or intervene in any political campaign in behalf of any candidate for public office" would also be prohibited by the USPS from doing so for content-neutral and speaker-neutral reasons (Pl. Mem. in Supp. of P.I. Mot. at 18).

25. In 1980, the last presidential election year comparable to 1984, the Houston Local's registration drive yielded 1,500 postal worker voter registrations. In each of the off years of 1982 and 1983, the Local registered between 300 and 500 employees, somewhat less in 1983. (Shepherd Dec. ¶ 2). The 1984 registration drive was set to begin in February. As in the past, the Local would have manned voter registration tables in the main swing room and employee cafeteria during periods of time on all three tours. The target was approximately 2,900 employees at the General Post Office ("GPO") (*Id.*, ¶ 4). The Local was forced to call it off when they learned of

the Bulletin in February, just as the drive was about to begin. They attempted to direct postal workers to the union hall seven (7) miles away, but to date have managed to register only about 100 employees (*Id.*, ¶ 5).

26. Attempts to register voters on public property and on their way to and from work at the GPO were bound to fail, and have not even ben tried. Most employees at the GPO work at night. The GPO is located in a bad "skid row" area of Houston, which is unsafe. Automobile break-ins and vandalism are a regular event, and over the last several years postal workers have been mugged and raped in the vicinity of the GPO. It would be unsafe to set up voter registration tables on public property, especially at night. Local President Shepherd would not ask their volunteers to do it, and he would not feel safe doing it himself (*Id.*, ¶ 6, p. 3). Furthermore, employees enter and exit the GPO from two employee entrances, which are some distance from public property, from several directions on the routes to several parking lots off-premises where most of them park. Most would not be encountered at any one location on public property. They are in a rush to get to work or to leave after work. There is no comparison between the Local's ability to register voters during the meal and break periods at work and its ability to do so off postal premises before and after work (*Id.*, ¶ 6, p. 4). Shepherd is certain that some postal workers will not be registered at all if they are not allowed to register voters on postal premises as in the post. (*Id.*, ¶ 9, p. 5).

27. In response to a survey in 1982 disclosing that only about 44 percent of local union members in Cuyahoga County were registered to vote, the Cleveland Local decided as a public service and a service to its members to conduct voter registration activities. These efforts were aimed at the approximately 3,000 postal workers at the Cleveland General Mail Facility ("GMF"), which is a 24 hour a day, seven day a week operation. About 20 to 30

officers and members volunteered to be deputized as registrars. With the permission of the postmaster, the Local set aside a table in the cafeteria. Local stewards and deputy registrars distributed voter registration forms on nonwork time in the cafeteria and break areas, asking that they be executed in the presence of one of the registrars. Carter estimates that registration of postal employees increased about 8 percent. (Carter de ¶ 1-5).

28. The Cleveland Local's planned drive for 1984 included the use of over 30 registrars who have already been deputized. (In addition to the program in 1982, the Local intended to staff tables in shopping malls around the city to register the general public.) They were scheduled to begin on April 1, with vigorous activity up to the April 9 deadline. The Local called off these plans when they learned of the Bulletin in December to avoid jeopardizing anyone's job (*Id.*, ¶ 6-8).

29. There is no alternative means effectively to register postal workers in substantial numbers. The Cleveland BMF, like most large postal facilities, is located in the core of the city (*Id.*, ¶ 9, p. 5). Employees' schedules provide no free time before and after work in the vicinity of the GMF. Employees' residences are scattered throughout the Cleveland area. The only opportunity that local officers or deputy voter registrars have to reach postal workers in substantial numbers to encourage them to register is at the GMF during nonworking time (*Id.*, ¶ 9, p. 5).

30. The Albuqueque Main Post Office is located in an industrial area of the city. Employee parking is on postal premises, and almost everybody drives to work. It is virtually impossible for the Local's volunteers to register postal workers off postal premises because they are already in their cars on postal premises when they leave or arrive. In addition, the traffic lanes out of the parking area to the front of the building make it impossible to stop cars on their way in and out. It takes several minutes to register a voter in New Mexico (Miera Dec. ¶ 7).

31. Since the Bulletin came out, the Local posted a notice on the Union bulletin board on April 2 asking unregistered APWU members to register at the April union meeting, held April 10. The Union's hall is about four miles from the Main Post Office. It has been able to register only two voters this way (*Id.*, ¶ 8).

32. After the Court issued a TRO, the Cleveland Local conducted a voter registration drive among postal workers on postal premises between April 6 and April 9, 1984. In that period, its volunteers registered 99 employees and recorded 38 change of address forms (Carter 2d Dec., ¶ 5).

33. After the TRO was issued, the Cincinnati Local, on April 9, 1984, conducted a one-way voter registration drive among postal workers on postal premises in nonworking areas, and registered 46 voters (Braunstein 2d Dec. ¶ 5).

34. The APWU alleges that the difficulty faced by the Cleveland, Houston and Albuqueque Locals in registering postal workers off premises is typical of the situation throughout the country, and the defendants have introduced no evidence to the contrary (Anderson, Shepher, Miera & Carter 1st Dec's.).

35. The APWU and its Locals have members who belong to many political parties other than the Democratic Party, and who entertain political beliefs of all kinds. The APWU's policy is to encourage its members to register and to vote their convictions whatever they may be (Erskine Dec. ¶ 5).

36. Under Section A(1) of the Guidelines, the USPS bars the APWU and its affiliated locals from registering voters anywhere on postal premises, including both lobbies and the nonworking areas of the post office generally inaccessible to the public. The defendants justify this restriction for the following reasons (Thomas Aff. ¶ 14):

14. The purpose of Section A(1) of the Postal Bulletin article is to ensure that voter registration is conducted only by the appropriate state or local government agencies or by nonpartisan organizations that are not also participating or intervening in a political campaign on behalf of a candidate for public office. If the Postal Service were to allow partisan organizations to register voters on postal premises, the public may well perceive that the Postal Service somehow endorsed or approved the candidate supported by the organization and could feel that the Postal Service was not impartial.

37. Section A(3) of the Guidelines prevents *individual employees* (including APWU members) as opposed to the Unions as organizations, from registering voters anywhere on postal premises, including both lobbies and nonworking areas of the post office generally inaccessible to the public. The defendants justify this restriction for the following reasons (Thomas Aff., ¶ 15-16):

15. Section A(3) is necessary to avoid any possible appearance that the Postal Service is involved, through its employees, in the political process. If that appearance were created, then postal customers could lose their confidence that their communications will be delivered efficiently, promptly and impartially no matter what their particular message might be. These guidelines only apply on postal premises, where the risk of public perception of postal involvement in the political process is greatest. These guidelines do not prohibit postal employees from participating in voter registration anywhere other than on Postal Service premises.

16. Section A(3) also seeks to prevent coercion or the appearance of coercion of other postal employees who otherwise might feel pressured either to register to vote or to register a certain way if approached

on postal premises by their co-workers. If the Postal Service were to allow solicitation of voter registration by its employees, then both the postal employees solicited and the members of the public who became aware of the practice might perceive the Postal Service as being involved in the partisan process.

38. The USPS has never proposed less restrictive regulations than those contained in the Guidelines addressing its purported concerns as described in paragraphs 36-37, above (Braunstein 1st Dec.)

39. A typical large city has one main postal facility, called a general post office ("GPO") or a general mail facility ("GMF"), where, as a rule, the largest number of employees work. An example is the Main Post Office, on North Capitol Street in Washington, D.C. These facilities tend to be in the center of urban areas, for example, Chicago and St. Louis; sometimes they are in dangerous or decaying areas, for example, Detroit. In other areas, there may be a large facility servicing a geographic area, known as a Sectional Center Facility ("SCF"). All mail is funnelled into and out of the SCF for a large area. An example is the Northern Virginia SCF, in Merrifield, Virginia, which serves all of Northern Virginia. About 1,800 employees work in this facility. At a minimum, several hundred employees work in an SCF, except in the least populated states. SCF's tend to be in outlying areas. Almost all employees in these facilities drive to and from work (Anderson Dec., ¶ 2).

40. The majority of the work force represented by the APWU works afternoons and nights. Outgoing mail is generally processed between 2:30 p.m. and midnight. Incoming mail is generally processed between 10:30 p.m. and 7:30 a.m. Very few postal clerks work a typical day shift any longer. Mailhandlers and maintenance craft employees work approximately the same schedules Clerks and mailhandlers make up well over half of all postal

workers. These categories of employees tend to be concentrated in GMF's and SCF"s (*Id.*, ¶ 3).

41. There are also 21 bulk mail centers ("BMC's") around the country, which are large facilities usually servicing several states. They tend to be located outside large metropolitan areas. Here, too, employees generally work tours such as 6 a.m. to 2:30 p.m. and 2:30 p.m. to 11 p.m., and they drive to and from work and park on postal premises. An estimate of employment at BMC's ranges from several thousand (e.g., the New York Bulk and Foreign Mail Center) to several hundred (*Id.*, ¶ 4).

42. The inside of a typical mail facility is not open to the public. Postal facilities have several kinds of break areas. The swing room is a rest area physically separated from the work room floor, where mail is processed, usually with tables, chairs, and vending machines. Larger facilities may have an employee cafeteria, which is not open to the public. Sometimes the Postal Service designates an area within the larger area where mail processing goes on, but which is away from working areas. Some of these areas are connected to locker rooms. Typically, employees have their own entrances, often connecting directly with employee parking areas. Some are equipped with security devices to keep out non-employees (*Id.*, ¶ 5).

44. Postal workers generally get a meal period of between 30 minutes and one hour. Breaks tend to be two a day, running between 10 and 15 minutes. Employees often go to the areas described in paragraph 42, at break and meal times to smoke, eat and drink coffee and cold beverages, which are usually not permitted on the workroom floor. These areas are set aside for rest, eating and socializing. Often there is a union bulletin board or rack with APWU literature in one of these areas. It is permissible to sign up employees to join the union in these areas. Employees are free in these areas

to pass out literature and to circulate petitions, debate, discuss politics, or sports, or anything else they desire. Besides gambling and drinking alcoholic beverages, the USPS places no restrictions on peaceful employee conduct in these areas. The very purpose of these areas is so that a place is set aside within a postal facility for employee interaction without disruption of mail processing (*Id.*, ¶ 6).

44. The APWU is an unincorporated association of postal employees. Any nonsupervisory employee of the USPS within the Union's jurisdictional claim is eligible for membership. Virtually all union officers are employees of the Postal Service. Shop stewards and local officers generally work in the same facility where they represent employees.

45. The APWU is present in and part of the working environment of post offices throughout the country. The APWU has exclusive collective bargaining rights for all clerks, special delivery messengers, maintenance employees and motor vehicle service employees nationwide. APWU locals administer the National Agreement at the local level. Shop stewards and designated union representatives have the right to investigate grievances and to have access to documents, files and other records on company time at the facility under Article 17.3. Grievances are handled at Steps 1 and 2 by the locals at the facility itself under Article 15. Under Article 14.4, there are joint Labor Management Safety and Health Committees. Under Article 17.5, there are also joint labor relations committees. Many members belong to the APWU Health Plan, which is a department of the APWU established under the Federal Employee Health Benefits Act, to which the USPS contributes 75 percent of premiums under Article 21.1. Jobs are filled through a bid system established under Articles 37-40. These are but a few examples of the pervasive presence of the APWU and its

locals in the everday working environment of the post office.

Respectfully submitted,

O'DONNELL & SCHWARTZ

by /s/ Anton Hajjar
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(202) 887-5955
Attorney for Plaintiff APWU

Dated: April 17, 1984

Pl. Exh. 1(a)

AMERICAN POSTAL WORKERS UNION, AFL-CIO
SAN FRANCISCO LOCAL
Sales Mart Building, 1485 Bayshore Blvd., Box P
San Francisco CA 94124
14151 467 1920
[Union Label]

March 19, 1984

Jefferson Wilson, MSC Manager/Postmaster
United States Postal Service
1300 Evans Avenue
San Francisco, California 94188

Dear Postmaster Wilson:

We are requesting permission for members of our Legislative Committee and Auxiliary to conduct on-site non-partisan voter registration drives in San Francisco postal facilities prior to the 1984 primary and general elections.

We propose to use the same procedures as we have in voter registration programs prior to every election since 1980. That is, to set up tables in both the customers' lobby and the swing rooms of the major facilities, to assist both postal workers and postal customers in registering to vote or changing their registration. Tables will be staffed by volunteers on their own time, and members register off-the-clock. Partisan political discussion is absolutely prohibited while registering people to vote.

As you know, ten to fifteen percent of our members change their addresses in any given year. Working the hours they do, it can be very difficult for them to up-date their registration. For this reason, our voter registration service has been much appreciated by our members and their families. It has also been valuable in bringing our

members who have recently attained citizenship status into the mainstream of the American political system. Postal customers have also expressed gratitude for this service. We have frequently been praised for being the only such service "where they're not pushing us to vote their way".

If "vote by mail" applications are available to us, we will also assist our members and customers in completing these.

As it will take us some time to make our preparations, we would appreciate your early response to this request. We would like to schedule our pre-primary registration drive the week of April 30-May 7, 1984.

In union solidarity,

/s/ Maggie Clark
MAGGIE CLARK
Legislative Chairman

/s/ Woody R. Skipper
WOODY R. SKIPPER
General Vice President

Pl. Exh. 1(b)

UNITED STATES
POSTAL SERVICE
San Francisco, CA 94188-9998

March 21, 1984

Woody R. Skipper
General Vice President
American Postal Workers Union, AFL-CIO
Sales Mart Building, 1485 Bayshore Blvd., Box P
San Francisco, CA 94124

Dear Mr. Skipper:

With reference to your letter of March 19, 1984, requesting to conduct voter registration on postal premises, please be advised that your request is denied.

I am enclosing a copy of Page 9 of the Postal Bulletin of December 1, 1983, for your information.

/s/ Jefferson Wilson
JEFFERSON WILSON
MSC Manager/Postmaster
1300 Evans Avenue, Room 308
San Francisco, CA 94188-9998

[Enclosure to Plaintiffs Exhibit 1(b) omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0270

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Plaintiff,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Defendants.

PLAINTIFF'S SUPPLEMENTAL STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

46. Article 23 has been in the contract unchanged since 1971, the first contract under the Postal Reorganization Act, which granted collective bargaining rights to postal workers. It deals with the visitation rights of Union officers who are not employed at the facility. This includes the right to be on the workroom floor (i.e., working areas of the facility) and in nonwork areas (i.e., working areas of the facility) and in nonwork areas (e.g. swing rooms, employee cafeterias and break areas). They are allowed, upon reasonable notice, to visit to engage in either collective bargaining-related or union-related business. It does not apply to Union officers, such as shop stewards, who are employed at the facility. Under Article 17, these stewards are allowed a reasonable amount of on-the-clock time for collective bargaining purposes, such as processing grievances. There are no contractual restrictions on their other activities, whether union-related or otherwise, while they are on nonwork

time and in nonwork areas, so long as they are not disruptive. (Neill Decl. ¶ 2.)

47. Article 23 has never been applied to bar Union officers who are employed at the facility from postal premises when they appear on Union or collective bargaining business, even without advance notice. There has never been a national-level interpretive arbitration construing Article 23. (*Id.* ¶ 3, Tabbita Decl. ¶1.)

48. Article 23 does not prohibit nonpartisan voter registration sponsored by the APWU or Local union. Other than in briefs to the Court in this case, the USPS has never cited Article 23 to the APWU or any Local as a basis to prohibit nonpartisan voter registration sponsored by the APWU or Local union. (*Id.* ¶ 4.)

49. Nonpartisan voter registration sponsored by the APWU or a Local is legitimate union business under Article 23. Non-employee Union officers need only give advance notice to enter for this purpose; those employed, but not then on duty, may enter without advance notice, and Union officers on duty at the facility may remain on the premises to register fellow employees in nonwork areas on their nonwork time. (*Id.* ¶ 5.)

50. The Detroit GMF has a security system that uses a card that prevents employees from entering the working areas of the post office except on their scheduled tour. Union officers, however, have cards which allow them to enter at any time. Those Union officers employed there simply enter without advance notification, so long as they are on Union or collective bargaining-related business. At the GMF and at other facilities, they simply inform the management person in charge that they are present in the building. This situation is typical of circumstances in many metropolitan-area post offices. (Tabbita Decl. ¶ 2.)

Respectfully submitted,

O'DONNELL & SCHWARTZ

by: /s/ Anton Hajjar
ANTON HAJJAR
1126 Sixteenth Street, N.W.
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(202) 887-5955

Dated: June 7, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0270

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Plaintiff,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Defendants.

DEFENDANTS' STATEMENT OF MATERIAL FACTS

Defendants submit this statement of facts as to which they contend there is no genuine issue, pursuant to Local Rule 1-9(i), in support of their motion for summary judgment:

1. In July, 1982, the United States Postal Service informed Congress that it opposed legislation that would have permitted use of post office space for "soliciting voter registration." Sanders Letter of July 22, 1982 (Exhibit 1).

2. Among its reasons were:

> The Postal Service believes that permitting voter registration solicitation in postal lobbies would be disruptive of the orderly and efficient transaction of postal business by the public. *While the Postal Service would have authority to establish such a program without need for a change in the law*, it has found that requests for such privileges must be

> denied in the interest of the most effective and economical management of the available resources.

Id. (emphasis added).

3. The Postal Service further noted that, if voter registration solicitation were allowed in postal lobbies, it could not be restricted solely to "nonprofit organizations" as the legislation contemplated:

> [P]ermitting the use of postal lobbies for voter registration only by nonprofit organizations could be viewed as unjustifiably discriminatory by other groups or organizations who wanted the same opportunity for the same or other worthwhile purposes.

Id.[1]

4. On September 30, 1982, the president of the American Postal Workers Union ("APWU") wrote to the Postal Service objecting to "a decision . . . to prohibit the use of postal facilities for the registration of voters." Pltf. Mot. for a Preliminary Inj., Ex. 2.

5. By letter of October 14, 1982, an Assistant Postmaster General responded:

> The Postal Service believes that permitting voter registration and other nonpostal-related business in postal facilities could be disruptive to the orderly and efficient transaction of postal business by our customers.
>
> Voter registration is the responsibility of local governments and is generally carried out in the schools, libraries, fire stations, and other local public buildings. We do not intend to participate in this nonpostal-related activity at this time.

Id. Ex. 3.

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[1] The voter registration regulations now in place, therefore, do not use only a "nonprofit" standard. *See infra* ¶¶ 9-10.

6. In November, 1983, the Postal Service informed the president of the APWU that it was proposing to make postal facilities available to voter registration activities under certain limited conditions. *Id.* Ex. 4. A draft of the regulations under which postal facilities would be available was forwarded to the president of the APWU for comments. *Id.*

7. In the December 1, 1983, edition of the Postal Bulletin, the Postal Service published regulations for the "Use of Postal Premises for Voter Registration and Polling." *Id.* Ex. 1; Thomas Aff't ¶ 4. The regulations were prepared under the supervision of the Postal Service's Delivery Services Department, which controls lobby operations at post offices. *Id.*

8. Overall, the regulations provide:

> Postmasters approached regarding the use of postal premises for registration and polling purposes should use the following guidelines.

Id. Ex. 1.

9. The voter registration regulations provide:

> A postmaster may approve voter registration requests provided all the following conditions are met.
>
> (1) The registration must be conducted by government agencies or nonprofit civic leagues or organizations that operate for the promotion of social welfare but do not participate or intervene in any political campaign on behalf of any candidate for any public office.
>
> (2) Absolutely no partisan or political literature will be available, displayed, or handed out. This includes photographs or likenesses of elected officials and candidates for public office.
>
> (3) Postal employees must not participate in any voter registration activity conducted on Postal Service premises.

(4) The registration must not interfere with the conduct of usual postal business, postal customers, or postal operations.

(5) The organization will provide and be responsible for any equipment and supplies.

(6) Contributions may not be solicited.

(7) Access to the workroom floor is prohibited.

(8) Voter registration activities will not become permanent, but will be limited to an appropriate period before an election.

Id.

10. The polling regulations provide:

Approval to use postal premises as a polling place is given by the Postmaster General or his designee. A request to use a postal facility will be considered only if the facility is the only reasonable available place for voting in the area and the following conditions are met.

(1) The facility must be used as is and must not be materially altered to accommodate machines, voters or workers.

(2) The Postal Service will not provide any assistance in the installation or removal of items needed for voting or in the polling process itself.

(3) Voting must not interfere with normal postal business.

(4) Voter entrances and exits must be arranged to ensure the security of the mails.

(5) Workroom floor space may not be used for voting.

(6) Local law enforcement officials must agree in advance to enforce Postal Service regulations gov-

erning conduct on postal premises and all applicable state and local laws during the voting.

(7) The state or local government must agree in advance to reimburse any costs incurred by the Postal Service for additional security, utilities, or building operations necessary to allow the use of facility for voting.

(8) There must be an absolute prohibition against the display or distribution of any political literature, badges, insignia, or posters on Postal Service premises, including parking areas.

Id.

11. The polling place guidelines have been in effect since August 14, 1980, when they first were published in the Postal Bulletin. Thomas Aff't ¶ 20. The Postal Service has received, in the past, only very few requests for use of post offices as polling places. *Id.* To date this year, only one such request has been made, and it was approved. *Id.*

12. Groups that violate the conditions of the guidelines will be escorted off of postal premises. Fleming Aff't ¶ 18. The guidelines are not work rules of the Postal Service, and they cannot result in discipline of Postal Service workers for work rule infractions. Downes Aff't.

13. The primary mission of the Postal Service is to collect, process, and deliver mail. 39 U.S.C. § 101; 39 C.F.R. § 1.1. The Postal Service's first priority is to ensure that space in postal facilities is used for mail processing, and for the sale of postal products and services to the public, in an efficient manner. Any other use of postal space must not interfere with these postal operations. Thomas Aff't ¶ 5.

14. By regulation, activities that may be conducted in postal lobbies are limited to those that can be conducted

without interfering with the provision of postal services and products to the public. Fleming Aff't ¶ 4. and Ex. 1 (Postal Operations Manual § 220).

15. Under current design standards, post office lobbies are made only large enough to accommodate postal operations. Fleming Aff't ¶ 5.

16. When postal facilities contain lobby space in excess of that needed for these postal operations, postal regulations allow that space to be made available for purposes prescribed by law. *Id.* ¶ 6. One such purpose is to provide space to blind vendors. *Id.*

17. Additionally, when lobby wall space is available, post offices may display notices for Members of Congress and other government officials and agencies. *Id.* ¶ 7-8. Among the notices that are displayed are official local, state, and federal elections notices. *Id.* ¶¶ 7-9,

18. Where postal operations will not be hampered, the Postal Service also may provide services, at lobby windows, on behalf of other government agencies. *Id.* ¶ 10. These services, for which USPS is reimbursed, include accepting passport applications and Selective Service registration forms. *Id.*

19. Under other regulations, soliciting contributions, campaigning for election to any public office, collecting private debts, commercial solicitation and vending, and the display or distribution of commercial advertising on postal premises all are prohibited. *Id.* ¶ 12.

20. In 1978, the Postal Service issued regulations terminating its prior practice of allowing nonprofit organizations to use lobby space for fund-raising. *Id.* ¶¶ 13-15. The Postal Service found it difficult to allocate its scarce lobby space among all the organizations that sought to make use of it. *Id.* Additionally, fund-raising materials became scattered throughout postal lobbies, creating clutter and disorder. *Id.*

21. Beyond voter registration and polling pursuant to the regulations, and the other activities described above, no other non-postal activities may take place in post office lobbies. *Id.* ¶ 16.

22. This ban on other activities in postal lobbies applies to employee groups, like APWU. *Id.* ¶ 17.

23. The Postal Service has concluded that it cannot permit non-postal activity in its facilities which could create an appearance, or public perception, that the Postal Service is involved in the political process and therefore is biased in the performance of its functions. Thomas Aff't ¶ 6.

24. Congress reorganized the Postal Service in 1970 and attempted to insulate it from influence by, or involvement in, the political process. Thus, the Postmaster General is no longer a presidential appointee or a member of the Cabinet. Postmasters and other postal officials now are career employees, rather than political appointees. Political recommendations in personnel actions are barred. 39 U.S.C. § 1002. By statute the Postal Service is to be operated in an efficient, business-like manner. *Id.* ¶ 7; *see* 39 U.S.C. § 403(a).

25. Congress also specifically ensured that the Hatch Act continued to apply to employees of the reorganized Postal Service. *Id.* ¶ 8; 39 U.S.C. 410.

26. The Postal Service is the most pervasive of federal agencies, with offices, branches, or stations in almost every community. In many communities it is the only visible federal presence, and Postal Service employees visit homes and businesses every day. *Id.* ¶ 10.

27. As the primary carrier of letters and other mail, the Postal Service also is one of the most important communications mediums in the nation. *Id.* ¶ 11.

28. To maintain its position in an increasingly competitive delivery market, the Postal Service must retain

the public trust that it will transmit written communications without political bias or favoritism. Members of the public must be encouraged to entrust their written communications to the Postal Service without fear that those communications will be shared, mishandled, or delayed because the Postal Service, or its employees, hold views that are different from the views of postal customers. *Id.* ¶ 12.

29. These considerations underpinned the regulations adopted by the Postal Service with respect to use of postal facilities for voter registration and polling. *Id.* ¶¶ 13, 21.

30. Section (A)(1) of the regulations seeks to ensure that voter registration on postal premises is conducted only by groups that do not participate or intervene in a political campaign on behalf of any candidate for any public office. Solicitation of voter registration on postal premises by groups that do participate in political campaigns on behalf of specific candidates could give the public the impression that the Postal Service endorses or approves the candidate supported by that organization. *Id.* ¶ 14.

31. Section (A)(3) of the regulations seeks to prevent the appearance or reality of political coercion of Postal Service employees. Those employees might feel pressured either to register to vote, or to register with a certain party affiliation, if their co-workers, who remain free to urge and encourage voter registration or party affiliation, also were permitted to conduct actual voter registration on postal premises. *Id.* ¶ 16.

32. Section (A)(3) of the regulations does not prohibit postal employees from conducting voter registration anywhere other than on postal premises. *Id.* ¶ 15.

33. Section (A)(7) of the regulations prohibits voter registration on the workroom floor of postal facilities,

where mail is sorted and handled. Only on-duty postal employees are allowed on the floor in order to protect the security of the mail and to asure that mail is processed as safely and as efficiently as possible. Persons engaging in voter registration on the workroom floor would divert on-duty postal employees from their assigned duties, distract their attention from safety requirements, and would not always be under observation by security personnel. *Id.* ¶ 17.

34. Allowing voter registration on the workroom floor —where all other non-postal activities are prohibited— would create an impression that the Postal Service has conferred a favored status on voter registration, as opposed to nonpolitical activity. *Id.* ¶ 18.

35. Section (A)(8) of the regulations limits the duration of registration activity to periods just before an election when voter activity and interest is heightened. The primary mission of the Postal Service is to move mail, and any other permanent, non-postal, activity at post offices would conflict with that mission. *Id.* ¶ 19.

36. During most of the year local elections commissions or voter registrars maintain facilities for voter registration. It is the responsibility of local, not federal, agencies to conduct voter registration. *Id.* ¶ 19.

37. Section (B)(8) of the regulations seeks to parallel state and local restrictions on electioneering in the proximity of polling places. It applies only on election day. It does not otherwise affect the rights of Postal Service employees to wear or to display political buttons and similar paraphernalia. *Id.* ¶ 20.

38. Plaintiff APWU is affiliated with the AFL-CIO, which has endorsed a candidate for President. Pltf. Mem. at 15 n.6.

39. Many of the forms APWU uses to register voters include a space in which to designate political party affilication. Bailey Decl., Att. A.

40. Plaintiff APWU primarily seeks to register its members, and other postal employees, to vote. Pltf. Mem. at 4.

41. When it registers its own employees to vote, with forms disclosing party affiliation, APWU requests that the registration forms be returned to APWU instead of to the local voter registrar. Bailey Decl. ¶ 3.

42. In an advisory opinion interpreting the Hatch Act, the Office of the Special Counsel, U.S. Merit Systems Protection Board, has stated:

> Federal employees may participate in voter registration drives that are not identified with a political party or a partisan candidate for public office. When an organization endorses a candidate for office, that organization has taken a step which identified it with the candidate's success. It is, in our opinion, a partisan club for the duration of the campaign. A federal employee may not participate in a voter registration drive sponsored by a political party or by an organization that has become identified with a partisan candidate for public office.

Pltf. Mem. Ex. 9.

43. In another advisory opinion interpreting the Hatch Act, the Special Counsel informed two federal employee unions:

> [Y]ou state your unions have endorsed a presidential candidate in the election this year. . . . By these endorsements the unions have become identified with the success of the endorsed candidates. If the voter registration drives are part of a campaign to enhance the electoral performance of your endorsed candidates, then employees may not participate . . . .
>
> * * * * *
>
> Given the increasing use of voter registration as a tool in partisan political campaigns, we cannot ac-

> cept at face value your assertion that the drive you plan is "nonpartisan."
>
> The fact that the employee's political activity occurs under the auspices of a labor organization is irrelevant. Membership in a labor union neither increases nor decreases the employees First Amendment rights.

O'Connor Letter of April 6, 1984 (Exhibit 2). One of the two unions that received this letter—and which had stated that it had endorsed a presidential candidate—was affiliated with the AFL-CIO, as is plaintiff APWU. *Id.*

44. Plaintiff APWU never has requested an advisory opinion from the Special Counsel concerning whether postal employee participation in its planned voter registration activities would subject those employees to Hatch Act prosecution. Plaintiff is permitted by law to request such an advisory opinion. 5 U.S.C. § 1206(1).

45. Plaintiff APWU has had plans, and the ability, to conduct voter registration drives at locations other than postal facilities, such as shopping malls. Carter Decl. ¶ 6(e). In other areas, APWU has not attempted to conduct voter registration other than at postal facilities, believing such efforts to be "impractical." Sheperd Decl. ¶ 6.

Respectfully submitted,

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United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

/s/ Mitchell R. Berger
MITCHELL R. BERGER
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United States Postal Service

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0270

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Plaintiff,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Defendants.

DECLARATION

I, GERALD M. ANDERSON, in lieu of an affidavit as permitted by 28 U.S.C. § 1746, declare under penalty of perjury that the following is true:

1. I am Assistant Director of the Clerk Division of the APWU, which is an elected office. I have held that position since November 1978. Before that I was a Regional Representative in the Central Region of the APWU for 4 years. I was also President of the Illinois State Postal Workers Union, a federation of APWU locals in Illinois. I was President of the Springfield, Illinois, Local from 1963 to 1967. I was a shop steward from 1961 until 1970. I should mention that my pre-1971 offices were with the APWU's predecessor, the United Federation of Postal Clerks, which merged with 4 other unions in 1971 to form the APWU. I have been a postal worker since November 22, 1958. Over the years, and in these capacities, I have become familiar with the working environment in post offices throughout the United States. I have been in well over a thousand post offices throughout the country.

2. A typical large city has one main postal facility, called a general post office ("GPO") or a general mail facility ("GMF"), where, as a rule, the largest number of employees work. An example is the Main Post Office, on North Capitol Street in Washington, D.C. These facilities tend to be in the center of urban areas, for example, Chicago and St. Louis; sometimes in dangerous or decaying areas, for example, Detroit. In other areas, there may be a large facility servicing a geographic area, which we call a "mail factory," and the USPS calls a Sectional Center Facility ("SCF"). All mail is funnelled into and out of the SCF for a large area. An example is the Northern Virginia SCF, in Merrifield, Virginia, which serves all of Northern Virginia. About 1800 employees work in this facility. At a minimum, several hundred employees work in an SCF, except in the least populated states. SCF's tend to be in outlying areas, typically with large on-premises employee parking areas. Almost all employees in these facilities drive to and from work.

3. The majority of the work force represented by the APWU works afternoons and nights. Outgoing mail is generally processed between 2:30 p.m. and midnight. Incoming mail is generally processed between 10:30 p.m. and 7:30 a.m. Very few postal clerks work a typical day shift any longer. Mailhandlers and maintenance craft employees work pretty much the same schedules. Clerks and mailhandlers make up well over half of all postal workers. These categories of employees tend to be concentrated in GMF's and SCF's.

4. There are also 21 bulk mail centers ("BMC's") around the country, which are large facilities usually servicing several states. They tend to be located outside large metropolitan areas. Here, too, employees generally work tours such as 6 a.m. to 2:30 p.m. and 2:30 p.m. to 11 p.m., and they drive to and from work and park on

postal premises. I would estimate that employment at BMC's range from several thousand (e.g., the New York Bulk and Foreign Mail Center) to several hundred.

5. The inside of a typical mail facility is not open to the public. Postal facilities have several kinds of break areas. The swing room is a rest area physically separated from the work room floor, where mail is processed, usually with tables, chairs, and vending machines. Larger facilities may have an employee cafeteria, which is not open to the public. Sometimes the Postal Service designates an area within the larger areas where mail processing goes on, but which is away from working areas. Some of these areas are connected to locker rooms. Typically, employees have their own entrances, often connecting directly with employee parking areas. Some are equipped with security devices to keep out non-employees.

6. Postal workers generally get a meal period of between 30 minutes and one hour. Breaks tend to be two a day, running between 10 and 15 minutes. Employees often go to the areas described in paragraph 5, at break and meal times to smoke, eat and drink coffee and cold beverages, which are usually not permitted on the workroom floor. These areas are set aside for rest, eating and socializing. Often there is a union bulletin board or rack with APWU literature in one of these areas. It is permissible to sign up employees to join the union in these areas. Employees are free in these areas to pass out literature and to circulate petitions, debate, discuss politics, or sports, or anything else they desire. Besides gambling and drinking alcoholic beverages, I know of no restrictions on peaceful employee conduct in these areas. The very purpose of these areas is so that a place is set aside within a postal facility for employee interaction without disruption of mail processing.

7. The APWU is an unincorporated association of postal employees. Any nonsupervisory employee of the

USPS within the Union's Jurisdictional claim is eligible for membership. See APWU Constitution, Attachment A, Art. 3. Virtually all union officers are employees of the Postal Service. Shop stewards and local officers generally work in the same facility where they represent employees.

8. The APWU is present in and part of the working environment of post offices throughout the country. The APWU has exclusive collective bargaining rights for all clerks, special delivery messengers, maintenance employees and motor vehicle service employees nationwide. Our locals administer the National Agreement (Attachment B) at the local level. Shop stewards and designated union representatives have the right to investigate grievances and to have access to documents, files and other records on company time at the facility under Article 17.3. Grievances are handled at Steps 1 and 2 by the locals at the facility itself under Article 15. Under Article 14.4 there are joint Labor Management Safety and Health Committees. Under Article 17.5, there are also joint labor relations committees. Many members belong to the APWU Health Plan, which is a department of the APWU established under the Federal Employee Health Benefits Act, to which the USPS contributes 75% of premiums under Article 21.1. Jobs are filled through a bid system established under Articles 37-40. These are but a few examples of the pervasive presence of the APWU and its locals in the everyday working environment of the post office.

/s/ Gerald M. Anderson
GERALD M. ANDERSON

Dated: April 11, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0270

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Plaintiff,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Defendants.

DECLARATION

I, Thomas A. Neill, in lieu of an affidavit as permitted by 28 U.S.C. § 1746, declare under penalty of perjury that the following is true:

1. I am the Director of Industrial Relations for the American Postal Workers Union, AFL-CIO ("APWU"), which is a nationally-elected office. I have held this position since November 1983. My primary duties involve interpretation and enforcement of the national collective bargaining agreement. Before that, for ten (10) years, I was National Vice President of the Clerk Craft in the Southern Region of the United States Postal Service, covering Texas and Louisiana. In that office, which is a regionally-elected one, I handled grievances from Step 3 on, and litigated arbitrations under the collective bargaining agreement. I am thus in a position to know the history and interpretations of the contract.

2. Article 23 has been in the contract unchanged since 1971, the first contract under the Postal Reorganization Act, which granted collective bargaining rights to postal workers. It deals with the visitation rights of Union officers who are not employed at the facility. This includes

the right to be on the workroom floor (i.e., working areas of the facility) and in nonwork areas (e.g. swing rooms, employee cafeterias and break areas). They are allowed, upon reasonable notice, to visit to engage in either collective bargaining-related or union-related business. It does not apply to Union officers, such as shop stewards, who are employed at the facility; they are, of course, already in the facility. Under Article 17 these stewards are allowed a reasonable amount of on-the-clock time for collective bargaining purposes, such as processing grievances. There are no contractual restrictions on their other activities, whether union-related or otherwise, while they are on nonwork time and in nonwork areas, so long as they are not disruptive.

3. Article 23 has never been applied to bar Union officers who are employed at the facility from postal premises when they appear on Union or collective bargaining business, even without advance notice. They are not "outside" officers to whom Article 23 is directed. According to our records, there has never been a national-level interpretive arbitration construing Article 23. It simply has never been a problem up to now. It has been applied by the Union and management in a common sense way and has not been controversial.

4. As this article applies to voter registration sponsored by the APWU or Local union, it does not prohibit it, and has never been cited to me or, to my knowledge, any other Union officer to prohibit it. Various locals, including the Houston Area Local, which I am personally familiar with, sponsored voter registration drives on postal premises in nonwork areas, conducted by postal workers on nonwork time, without interference from management. Certainly they did not object on Article 23 grounds. In fact the only time I have seen Article 23 cited to justify the restrictions in Postal Bulletin 21434 was in the government's April 30 brief.

5. Nonpartisan voter registration sponsored by the APWU or a Local is legitimate union business under Article 23. Non-employee Union officers need only give advance notice to enter for this purpose; those employed, but not then on duty, may enter without advance notice (although I am certain neither the APWU nor any Local would object to giving such notice), and Union officers on duty at the facility may remain on the premises to register fellow employees in nonwork areas on their nonwork time.

/s/ Thomas A. Neill
THOMAS A. NEILL

Dated: June 6, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0270

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Plaintiff,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Defendants.

DECLARATION

I, PHILLIP A. TABBITA, in lieu of an affidavit as permitted by 28 U.S.C. § 1746, declare under penalty of perjury that the following is true:

1. I am currently Special Assistant to the President of the American Postal Workers Union, AFL-CIO ("APWU"), which is a staff position in the Industrial Relations Department. Among other duties, I am in charge of the Union's computerized grievance and arbitration retrieval system. I searched for intepretive grievances and/or arbitrations dealing with the interpretation of Article 23 and found none.

2. Before I assumed this position, I was Director of Industrial Relations for the Detroit District Area Local for seven (7) years. I was a full-time officer on leave from the Postal Service. The Detroit GMF has a security system that uses a card that prevents employees from entering the working areas of the post office except on their scheduled tour. Union officers, however, had cards which allowed them to enter at any time. Those of us employed there simply entered without advance notifica-

tion, so long as we were on Union or collective bargaining-related business. At the GMF and at other facilities, we simply informed the management person in charge that we were present in the building.

/s/ Phillip A. Tabbita
PHILLIP A. TABBITA

Date: June 6, 1984

(2)

Supreme Court, U.S.
FILED
DEC 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-456

In the Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
PETITIONER

v.

UNITED STATES POSTAL SERVICE AND
PAUL N. CARLIN, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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9 pp

TABLE OF AUTHORITIES

Page

Cases:

Cornelius v. *NAACP Legal Defense & Educational Fund, Inc.*; No. 84-312 (July 2, 1985) 3-4, 5, 6

Lehman v. *City of Shaker Heights*, 418 U.S. 298 5

Perry Education Association v. *Perry Local Educators' Association*, 460 U.S. 37 ..... 2, 4, 5, 6, 7

Constitution:

U.S. Const. Amend. I 1, 2, 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-456

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
PETITIONER

v.

UNITED STATES POSTAL SERVICE AND
PAUL N. CARLIN, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner asserts that the United States Postal Service violated its First Amendment rights by barring it from conducting voter registration on Postal Service property prior to the 1984 election pursuant to guidelines that permit only nonpartisan groups to register voters on Postal Service premises.

1. Anticipating the election-year activities of 1984, the United States Postal Service on December 1, 1983, issued guidelines concerning the use of Postal Service property as sites for voter registration and as polling places on election day.[1] The guidelines relating to voter registration contained several requirements, including the condition that "[t]he registration must be conducted by government agencies or

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[1]The guidelines are reprinted at Pet. App. 37a-39a.

nonprofit civic leagues or organizations that operate for the promotion of social welfare but do not participate or intervene in any political campaign on behalf of any candidate for any public office" (Pet App. 37a). After the issuance of the guidelines, postmasters barred petitioner and its local unions from conducting voter registration in Postal Service buildings on the ground that petitioner had " 'participate[d] or intervene[d]' in the 1984 presidential campaign on behalf of Walter Mondale" (*id.* at 3a).[2]

Petitioner subsequently commenced this action in the United States District Court for the District of Columbia seeking an injunction against enforcement of the guidelines on the grounds that they violated the relevant civil service statutes and the First Amendment. The district court granted the government's motion for summary judgment (Pet. App. 18a-36a). The court first concluded that the Postal Service premises upon which petitioner sought to conduct voter registration were neither public fora nor fora intentionally opened to expressive activity by the government. Applying the reasonableness standard for evaluating restrictions upon the use of a nonpublic forum set forth in *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37 (1983), the district court upheld the Postal Service guidelines. The court found that the guidelines limiting access for purposes of conducting voter registration to nonpartisan groups were justified on the ground that activities conducted by partisan groups "could lead to the perception or appearance that the Postal Service is involved in the political process or is biased in the performance of its mission" (Pet. App. 26a). It further concluded that petitioner was not eligible to conduct voter registration

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[2]In previous election years a number of petitioner's local unions had been permitted to conduct voter registration drives in both public and nonpublic areas of Postal Service buildings (Pet. App. 2a-3a).

under the guidelines because petitioner supported one of the candidates running for President (*id.* at 29a-31a).[3]

The court of appeals affirmed (Pet. App. 1a-13a). It "agree[d] with the District Court that the nonpublic forum standard is applicable to [petitioner's] access claim, that the Postal Service's interest in avoiding an appearance of involvement in the political process is reasonably promoted by restricting on-premises registration to clearly nonpartisan organizations, and that the provision was properly applied to [petitioner]" (*id.* at 5a).

2. The unanimous decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

At the outset, it is clear that the courts below correctly determined that the Postal Service premises to which petitioner sought access are nonpublic fora. In its cases addressing First Amendment-based claims for access to government property, this Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes" (*Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, No. 84-312 (July 2, 1985), slip

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[3]Petitioner also challenged a separate provision of the guidelines providing that "[p]ostal employees must not participate in any voter registration activity conducted on Postal Service premises" regardless of the identity of the organization sponsoring the voter registration (Pet. App. 37a). The district court upheld the constitutionality of this requirement (*id.* at 31a-36a), but the court of appeals vacated and remanded that portion of the district court's judgment. The court of appeals held that the district court erred by ruling on the guidelines' constitutionality before addressing the "serious question" whether the guidelines were valid under the Hatch Act (*id.* at 6a). No question regarding this requirement of the guidelines is before this Court.

op. 10-11). When the particular government property is a traditional public forum—such as a public park—or "when the Government has intentionally designated a place * * * as a public forum," a speaker can be excluded only when exclusion is necessary to serve a compelling government interest (*id.* at 11). If the government property is a nonpublic forum, however, "[a]ccess * * * can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view' " (*ibid.*, quoting *Perry*, 460 U.S. at 46).

Since Postal Service buildings are neither traditional public fora nor locations that the government intentionally has designated as public fora, it is clear that the guidelines must be evaluated under a reasonableness standard. See *NAACP*, slip op. 16 ("the Government has the right to exercise control over access to the federal workplace in order to avoid interruptions to the performance of the duties of its employees"). Indeed, petitioner agrees that the Postal Service premises to which it sought access "are [not] public forums, or even limited public forums in the usual analysis" (Pet. 10).[4]

Moreover, petitioner does not appear to challenge the reasonableness of the Postal Service guidelines as a general matter. Such a challenge could not in any event succeed because this Court's decisions make clear that "avoiding the appearance of political favoritism is a valid justification for

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[4]At several points in its argument (Pet. 8, 10-11), petitioner appears to assert that the guidelines must be evaluated under a more stringent standard because this case involves the First Amendment rights of government employees. Petitioner is incorrect. Although petitioner represents federal employees, that circumstance plainly is irrelevant in evaluating the government's authority to limit access to government property. Petitioner's reliance upon cases concerning the First Amendment rights of federal employees is therefore misplaced.

limiting speech in a nonpublic forum." *NAACP*, slip op. 20; see also *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion). The Postal Service's reasonable conclusion that the presence of partisan organizations on Postal Service property could have given the appearance that the Postal Service had endorsed a particular partisan viewpoint thus justified the guidelines permitting only nonpartisan organizations to conduct voter registration activities (Pet. App. 5a, 26a-29a). The reasonableness of the guidelines was further supported by the fact (*id.* at 28a-29a) that partisan organizations could engage in voter registration at an almost unlimited variety of alternative sites. See *NAACP*, slip op. 20; *Perry*, 460 U.S. at 53-54.

Petitioner's argument consists of several challenges to the reasonableness of the Postal Service guidelines in the peculiar circumstances of this case. There is no merit to these fact-bound claims.

First, petitioner asserts that the guidelines were not reasonable because petitioner "is already present in [postal] facilities" (Pet. 8) and, therefore, permitting petitioner to engage in voter registration would not have resulted in any additional disruption of government activities. However, it is settled that "selective access does not transform government property into a public forum" (*Perry*, 460 U.S. at 47). Petitioner's presence on Postal Service property was tied to its representation of postal employees and thus was related to the activities of the workplace. Indeed, in *Perry* the Court observed that providing a teachers union with access to school mailboxes was justified by the union's "special responsibilities" to the teachers (*id.* at 52).

In this case, on the other hand, petitioner sought to engage in voter registration activities that were by definition unrelated to labor-management issues. Allowing petitioner to conduct such activities on Postal Service property despite petitioner's partisan stance in the 1984 election might

have identified the Postal Service with petitioner's partisan viewpoint—the very possibility that the guidelines were designed to avoid. Since the government may make distinctions in access to a nonpublic forum "on the basis of subject matter" (*Perry*, 460 U.S. at 49), and the distinction here was reasonable and viewpoint-neutral, petitioner's challenge to the guidelines is without foundation.[5]

Second, petitioner claims (Pet. 9-10) that postal workers would not have confused petitioner's views with those of the Postal Service, and that the guidelines therefore were unreasonable as applied to petitioner. However, the guidelines were not designed solely to prevent confusion; they also sought to avoid the impression that the Postal Service endorsed a particular partisan view (Pet. App. 26a). If petitioner had been exempted from the guidelines even though petitioner supported one of the presidential candidates, the Postal Service might have appeared to be lending its support to petitioner's candidate by permitting petitioner to register voters on Postal Service premises. This is especially true because petitioner would have been the only partisan group permitted to engage in voter registration.[6]

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[5]Petitioner also appears to argue (Pet. 8-9) that its voter registration activities in previous years show that the guidelines were unreasonable. However, the government's decision to restrict access to a nonpublic forum "need not be the most reasonable or the only reasonable limitation" (*NAACP*, slip op. 19). Since the Postal Service's decision here plainly was reasonable for the reasons discussed above, the possible existence of other reasonable alternatives is irrelevant.

[6]Petitioner also argues (Pet. 12-13) that because its voter registration activities would have been nonpartisan, the rationale underlying the guidelines did not apply. Petitioner completely ignores the fact that the guidelines were based upon the concern that the Postal Service might have been viewed as endorsing the electoral positions of an organization if it permitted the organization to register voters on Postal Service premises. Insulation of the Postal Service from such partisan positions is a matter of great importance. As the district court observed, "[t]he

Finally, petitioner asserts (Pet. 10-11) that it was denied access to Postal Service facilities on the basis of the content of its speech—because it endorsed Walter Mondale and opposed Ronald Reagan. This argument is frivolous. The Postal Service guidelines barred all groups adopting partisan positions from engaging in voter registration, without regard to the group's particular position. The guidelines unquestionably were content-neutral, and petitioner has offered no evidence suggesting that they were applied in a discriminatory manner. Cf. *Perry*, 460 U.S. at 49.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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Postal Service is perhaps the most pervasive of all government agencies. Its independence from the political process and freedom from the appearance of being involved in the political process is critical to its effective operation" (Pet. App. 27a).

DOJ-1985-12